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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-442

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

United States Fidelity and Guaranty Company,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 29, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 46) is reported at 11 EPD par. 11,018. The decision and order of the District Court is reported at 10 EPD par. 10,549 (App. 33-45).

[1] Hereinafter referred to as the "Company" or the "Petitioner."

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1976 (App. 46). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1966).

QUESTIONS PRESENTED

1) Whether the Equal Employment Opportunity Commission[2] improperly failed to refer its Commissioner's charge (E.E.O.C. Charge No. TBA5-0336) to an appropriate State or local agency, in compliance with Section 706(d) of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e-5(d).

2) Whether the Commission's procedures authorizing the same individual to recommend initiation of Section 707 charges, to investigate, conciliate and file suit is contrary to the intent of Congress and in violation of the requirements of the Act.

STATEMENT

A. The Commissioner's Charge

On August 16, 1974 former Commission Chairman John Powell issued a Commissioner's charge (E.E.O.C. Case No. TBA5-0336), pursuant to Sections 706 and 707 of the Act, 42 U.S.C. §§ 2000e-5, 6 (1974), alleging that the Appellant was discriminating on the basis of race, sex and national origin in various aspects of employment. Five days later, on August 21, 1974, the Commissioner's charge was filed with the Baltimore District Office of the Commission and hand-served upon the Company (App. 1). On the same day,

[2] Hereinafter referred to as "the Commission" or "the E.E.O.C." Herein, Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e *et seq.* (1964), as amended by Pub. L. 92-261, 86 Stat. 103 (1972), is referred to as "Title VII" or "the Act."

correspondence was directed by Ms. McGovern, a staff attorney and team captain in the E.E.O.C.'s Office of General Counsel, to the Company's Chief Executive Officer, disclosing the Commission's intention to commence an immediate investigation of the Commissioner charge (App. 15). As the District Court noted in its April 24, 1975 Opinion:

> [T]he E.E.O.C. did in fact conduct certain investigatory interviews at certain U.S.F.&G. offices during the month of September [1974]; namely, at the field offices in New Orleans, Louisiana and Dallas, Texas on September 10th and 12th respectively, and at the home office in Baltimore on September 16th. (App. 20).

Specifically, the Commission, per Ms. McGovern, requested the Company to furnish thousands of personnel records and documents relating to the allegations of the charge. On September 4, 1974, after the investigation had begun, E.E.O.C. District Director Dickerson first communicated the fact of the Commissioner's charge to Mr. Vernon Wingenroth, Assistant Director, Compliance Division, Maryland Commission on Human Relations (App. 3). The text of this letter included the following:

> Enclosed is a courtesy copy of a Commissioner's Charge alleging a violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> Since it is not a requirement of this Commission to defer for the usual 60 day period, we will proceed with the investigation as expeditiously as possible. *(ibid.)*

Subsequently, a full month after the E.E.O.C. communicated the fact of the Commissioner's charge to the Maryland Commission, the latter responded by letter dated October 3, 1974, acknowledging its "courtesy copy" of the charge and stating its intention not to

plan any further action regarding the matter (App. 4). The following events with respect to the Commissioner's charge then took a peculiar and, we submit, highly irregular, turn. Despite the E.E.O.C.'s already extensive ongoing investigation, the Company received a letter dated October 7, 1974, in which the E.E.O.C. concluded, "upon review of the file," that "service of the [Commissioner's] charge was premature," and advised the Company to "disregard service of [the] charge." (App. 6). Also on October 7, 1974, E.E.O.C. District Director Dickerson sent a *second* letter, which was hand-delivered that same day, to Mr. Wingenroth of the Maryland Commission (App. 4), which, as the District Court noted (App. 20), "varied markedly from the prior notification letter of September 4th:"

> In the October 7th correspondence, the State commission was advised on the Commissioner's charge and was offered the deferral of this charge. Furthermore, apparently pursuant to the directives expressed in the E.E.O.C.'s [internal Memorandum] Notice N-916, specifically the Seventh section thereof,[3] the State Commission was notified that it would be allowed a period of ten days to assume jurisdiction over the charge, and that if it failed to do so, the E.E.O.C. would assume jurisdiction. . . . (App. 20).

[3] Notice N-916, Section 7 states in pertinent part:

> PROCESSING SECTION 707 CHARGES. The team captain will transmit the charge to the Director of the designated District Office. The District Director shall follow the filing and deferral procedures as set forth in 29 CFR 1601.10 *et sec.*, immediately serving notice to the Respondent pursuant to 29 CFR Sec. 1601.13 and immediately notifying the appropriate State or local deferral agency as defined in Sec. 1601.12(c) allowing that authority 10 days within which to request an opportunity to act under its law pursuant to Sec. 1601.01. (App. 11).

By reply letter of the same date, Elbert L. A. Guillory, Executive Director of the Maryland Commission, informed the E.E.O.C. that "the Maryland Commission will not accept this offer." (App. 6). Thereafter, the Company was again served with a Notice of Charge of Employment Discrimination on October 8, 1974 (App. 7), and a copy of the text of the Commissioner's charge (App. 2-3). Although both the Maryland Commission and the Baltimore Community Relations Commission are recognized by the E.E.O.C. as so-called "706 agencies,"[4] only the Maryland Commission was notified of the pendency of the instant Commissioner's charge.

B. The Crawley Charge

Subsequent to the first attempted issuance of the Commissioner's charge discussed hereinabove, Edgar C. Crawley, Sr. filed an individual charge of racial discrimination against the Company on September 23, 1974 (E.E.O.C. Case No. TBA5-0586). Shortly thereafter, an administrative subpoena was issued by the District Director of the Commission's Baltimore District Office directing the Company to present certain documentary materials concerning the Crawley charge to Ms. McGovern, the team captain, who was exclusively involved in the investigation of the Commissioner's charge.

[4] "706 Agencies" refers to those local fair employment practice agencies to which the Commission, pursuant to Sections 706(c) and (d) of the Act, 42 U.S.C. §§ 2000e-5(c), (d) (1974), must refer all charges which are initially filed with the Commission. Section 706(d) of the Act specifically requires referral to such local agencies which the Commission designates as "706 Agencies" of Commissioner's charges, such as the one in question, as well. The Baltimore Community Relations Commission, as well as the Maryland Commission on Human Relations, have been so designated. 29 CFR § 1601.12(m) (1975).

The Company refused to comply and pursuant to Section 1601.15(b) of the Commission's procedural regulations, 29 CFR § 1601.15(b) (1975), petitioned the E.E.O.C. to revoke the Crawley subpoena. By order of March 13, 1975, the E.E.O.C. denied the Company's petition to revoke, and, upon its continued refusal to furnish the subpoenaed information, the E.E.O.C. filed suit in the United States District Court for the District of Maryland on March 26, 1975, seeking judicial enforcement of its subpoena *duces tecum*.

C. The April 24, 1975 Decision of the District Court

In an oral opinion delivered April 24, 1975, the District Court denied enforcement of the Commission's subpoena (App. 18-25). Specifically, the District Court concluded that the E.E.O.C.'s attempt at notification to an appropriate 706 agency, after the Commission had assumed jurisdiction over the charge — and, indeed, after it had already begun "rather intensive investigative efforts" (App. 24) — was "legally unsupportable due to the fact that [the] Commission violated the statutory mandate of 42 U.S.C. Section 2000e-5(d)." *(ibid.)*.[5] Accordingly, by Order dated April 28, 1975, the District Court denied enforcement of the instant subpoena, and dismissed the Commission's action.

D. The Rule 60 Proceedings

Upon issuance of the above-mentioned Order, the Commission filed an appeal with this Court. On June 4, 1975, the Commission further filed a Motion for Relief from Order under Rule 60 (App. 26-30).[6] Attached to the

[5] *See* Statutory Appendix, App. 47. *See also* 29 C.F.R. § 1601.10 (1975); App. 48.

[6] Federal Rules of Civil Procedure, Rule 60, 28 U.S.C. Rule 60 (1974) provides in relevant part:

Commission's Rule 60 Motion was the affidavit of Elbert L. A. Guillory, Executive Director, Maryland Commission on Human Relations (App. 31-32) (hereinafter, "the Guillory affidavit"), which contained the following language:

> It has been and continues to be a longstanding policy and practice of the [Maryland Commission] to decline all EEOC offers of referral which involve a charge filed by a Commissioner of the EEOC. . . . I am, and have been aware that [the Maryland Commission] has the prerogative to accept an EEOC offer of referral of an EEOC Commissioner's Charge. The staff of [the Maryland Commission] is similarly aware of [its] right in this regard.
>
> . . .
>
> The actions taken by EEOC coincidental to referring the [Commissioner's] charge to [the Maryland Commission] were entirely consistent with the understanding and practice which has been established between EEOC and [the Maryland Commission] i.e., to proceed with the investigation of an EEOC Commissioner's Charge . . . *(ibid.)*

. . .

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Thereafter, by letter to the parties dated July 28, 1975, Judge Murray responded to the Commission's Motion for Relief under Rule 60 and indicated his willingness to grant the E.E.O.C.'s Motion if the Circuit Court were to remand the case. The Commission subsequently moved for remand of the case to the District Court. The Commission's motion was granted, and the case was remanded.

On October 22, 1975, two days before the scheduled oral argument before the District Court, Counsel for the Company deposed Elbert L. A. Guillory,[7] upon whose affidavit the Court based the decision to reverse its previous Order. The Guillory deposition revealed, *inter alia,* that: (1) the so-called "longstanding policy and practice" of the Maryland Commission "to decline all EEOC offers of referral which involve a charge filed by a Commissioner of the EEOC" was an unwritten agreement, memorialized neither in procedural regulations nor in administrative directives of either agency (Guillory Deposition at pp. 6, 40-41; App. 44); and (2) that the exchange of letters on October 7, 1974 between the two agencies was, in Mr. Guillory's own words, "unnecessary administrative work," since he believed this "long-standing policy" required no written exchange between the agencies respecting Commissioner charges.

The apparent informality of procedure and policy involving the application of the mandatory referral provisions of the Civil Rights Act to his agency was tellingly pointed out by Mr. Tierney's statement (App.

[7] Hereinafter "the Guillory deposition." The contents of that deposition have been admitted into the instant Record on Appeal, and filed with the Clerk of the District Court on December 10, 1975. However, the transcript of this deposition was unavailable to the parties or to the District Court prior to the Court's Decision rendered October 31, 1975.

44) that "the policy [of non-acceptance of referral of EEOC Commissioner's charges] is a custom and practice that has been instituted by the Executive Director and carried out without formal promulgation of any written policies." (Guillory Deposition, p. 6). Thus, despite the Maryland Commission's status as a "706 Agency," with the admitted "prerogative to accept an EEOC offer of referral of an EEOC Commissioner's charge" (App. 31-32), its Executive Director testified to a lack of any written, properly promulgated policy or procedure dealing with this statutorily mandated process. Moreover, the Executive Director testified that he, or any person occupying his position, could change that policy at any time, at his whim, needing no consultation or communication with any other person in the agency (App. 45).

Although Mr. Guillory testified that this "informal and long-standing policy" required no letters of notification between the two agencies *(ibid.),* he could not explain the sudden necessity for the formal communications between the E.E.O.C. and the Maryland Commission on October 7, 1974 (App. 45).

E. The October 31, 1975 Decision of the District Court

Although the contents of the Guillory Deposition were not before the District Court when it rendered its decision on October 31, 1975,[8] the lower Court issued a second Oral Opinion, in which it vacated its Order of April 28, 1975 and ordered that the instant subpoena be enforced (App. 33-42). The Court reversed its prior ruling regarding the referral procedures followed by the Commission in this case, and stated:

[8] Counsel for the Company, in oral argument, recited the relevant substance of that deposition to the District and Circuit Courts.

> [R]equiring EEOC to tender a referral offer to the MCHR, within the technical requirements of the statute and regulations, would serve no practical purpose, nor is it required by the statute. . . . (App. 38).

The Court also held that the commingling of the E.E.O.C.'s investigative, decision-making, and conciliation functions in the same person or persons, was not violative of the Act.[9]

F. The Decision of the Court of Appeals for the Fourth Circuit

In a *per curiam* Decision dated June 29, 1976, the Court of Appeals for the Fourth Circuit affirmed the October 31, 1975 decision of the District Court "for the reasons stated by the District Judge in his oral opinion dated October 31, 1975." (App. 46).

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary in order to decide two questions of fundamental importance to the administration and interpretation of Title VII of the Civil Rights Act. Furthermore, the decision of the Court

[9] The District Court in its decision, affirmed and adopted by the Court of Appeals, also held that the information requested by the E.E.O.C. in the Crawley subpoena was not beyond the scope of the matters under investigation in the Commissioner's charge. The Petitioner submits that the Crawley charge, which alleged discharge as the sole form of discrimination, was improperly consolidated with the Commissioner's charge, which makes no allegation that the Company engaged in any pattern or systemic practice of discharging persons because of their race. Therefore, we contend that by improperly consolidating the Crawley charge with the Commissioner's charge, the Commission acted in violation of its own Regulation 1601.52, 29 CFR § 1601.52 (1975), which provides for consolidation only of *like* or *related* charges. (*See* App. 49).

of Appeals is in conflict with the decisions of the other circuits on this question.

I.

The Petitioner respectfully submits that the District Court's October 31, 1975 decision, affirmed and adopted by the Court of Appeals for the Fourth Circuit, seriously departs from the unequivocal requirements of Section 706(d) of the Act, 42 U.S.C. § 2000e-5(d), which mandates that "*before taking any action* with respect to" a Commissioner's charge, the E.E.O.C. shall "notify the appropriate State or local officials and, upon request, afford them a reasonable time . . . to act under such State or local law to remedy the practice alleged." (Emphasis supplied)

The District Court itself stated, in its initial decision in the instant case (dated April 24, 1975), that:

> [N]otification of the charge [to the state agency] is mandatory before any E.E.O.C. action may be taken with respect to such Commission charge.
>
> In the instant matter, the attempt at notification was, in this Court's opinion, nothing more than a mere courtesy and as such did not constitute the type of notification envisioned by the statute. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975) . . . (App. 21-22).

Moreover, by failing to timely notify the appropriate State agency and thereafter afford it a meaningful opportunity for review, the Commission acted in clear violation of its own rules and regulations. Specifically, Section 1601.10 of the E.E.O.C.'s Regulations, 29 CFR § 1601.10 (1975), provides that in the case of Commissioner's charges:

> [T]he Commission, before taking *any* action with respect to the charge, shall notify the appropriate

> State or local [agency] . . . and offer to refer the charge to it, . . . The Commission will allow the State or local authority a 10-day period to request an opportunity to act under its law except when EEOC notifies the appropriate authority in writing of a different time period. (App. 48).

The facts in this case clearly demonstrate the Commission's unwillingness to follow both the statutory and regulatory requirements in its processing of the Commissioner's charge, despite Congress's intent to carefully preserve the concurrent jurisdiction of state and federal governments. The legislative history of the referral provisions reveals a strong congressional concern for what Senator Humphrey described as "the basic philosophy of the bill — that, wherever possible, the problems dealt with by the bill should be resolved locally and voluntarily." 110 CONG. REC. 12707 (1964).

Indeed, the referral provisions were an integral part of the so-called "leadership compromise" which was introduced by Senators Humphrey and Dirksen in order to assure passage of Title VII. The Commission itself is clearly aware of the importance of and necessity for referring charges brought to it to the appropriate state agency. *See* 29 CFR §§ 1601.10, 1601.12 (1975) (App. 48). The Commission's own Compliance Manual states, at § 205.4 (Jurisdiction):

> The rule of thumb in potential deferral jurisdictions should be to defer all charges that [are] arguably cognizable under the relevant State or local [fair employment practices] law. . . .

The Petitioner submits that review is further mandated because of a serious conflict in the circuits. In its decision affirming the holding of the District Court, the Court of Appeals for the Fourth Circuit erroneously concluded that "notification and opportunity for deferral were provided" to the appropriate State agency

(App. 46). This conclusion, which assumes the validity of the notification and attempt at referral made by the E.E.O.C. in this case, conflicts with both the letter and the intent of decisions issued by the Courts of Appeals for the Sixth, Eighth and Ninth Circuits.

In *Crosslin v. Mountain States Telephone & Telegraph Co.*, 422 F.2d 1028 (9th Cir. 1970), *remanded with instructions* 400 U. S. 1004 (1971), the Court of Appeals for the Ninth Circuit held that a plaintiff's failure to first afford the appropriate State agency[10] the *opportunity* to accept deferral of a charge brought under Title VII was fatal, even though the plaintiff had acted on the advice of the E.E.O.C. (which had improperly concluded that the local agency was not entitled to deferral).

In *Motorola, Inc. v. E.E.O.C.*, 460 F.2d 1245 (9th Cir. 1972), *remanding with instructions* 317 F. Supp. 282 (D. Ariz. 1968), decided a year after *Crosslin*, the E.E.O.C. filed suit on a Commissioner's charge which it had failed to first refer to the Arizona Commission. The district court denied the respondent's motion to quash an E.E.O.C. demand for discovery, and Motorola appealed. The Ninth Circuit ordered that:

> [T]he district court shall retain jurisdiction for a time sufficient to allow the E.E.O.C. to notify the Arizona Civil Rights Commission and to allow that commission the statutory deferral period in which to act upon it. See 29 CFR § 1601.10, 1610.12(iv). If the Arizona Commission elects not to act, the district court may then proceed as the rights of the parties may then appear. *Crosslin v. Mountain States*. . . .

As the Court further stated in *Motorola, supra*, 460 F.2d at 1246:

[10] In *Crosslin*, the agency in question was the Arizona Civil Rights Commission.

> Under 42 U.S.C. § 2000e-5(c), an E.E.O.C. commissioner may not commence an unfair employment practice charge without first filing notice of such charge before a state agency which is authorized "to grant or seek relief from such practice." . . .

Again, in *E.E.O.C. v. Wah Chang Albany Corp.*, 499 F.2d 187 (9th Cir. 1974), that Court further observed:

> A fundamental policy of the Equal Employment Opportunity [Act] is to avoid federal action whenever possible by making the state a partner in the enforcement of Title VII. *See, e.g.*, 110 Cong. Rec. 12707 (1964) (remarks of Senator Humphrey). The deferral requirement of Section 706(c), 42 U.S.C.A. (1974) § 2000e-5(c), is thus an important feature of the statute, to be carried out by the executive department and to be upheld by the judiciary. . . .

499 F.2d at 189.

The fundamental importance of allowing the states to effectively participate in this "partnership" with the E.E.O.C. in the area of employment discrimination serves a number of vital purposes:

A. State and Local Resolution of Charges

When the Civil Rights Act was being drafted and debated in the Congress, Congressmen from many states feared that the integrity of their local agencies would be jeopardized by federal civil rights enforcement, and to allay these concerns, the Act's leading sponsors, Senators Humphrey and Dirksen, presented a "leadership compromise" to the Senate. *See* 110 CONG. REC. 12721-25 (1964) (remarks of Senator Humphrey). This compromise resulted in the dual enforcement scheme which plays so vital a part in the enforcement of the Act.

There are three major prongs to this dual enforcement plan. First, Section 708 of Title VII states:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.[11]

The second prong of this system is provided by Section 709(b),[12] which permits the E.E.O.C. and the states to enter into cooperation agreements under which the E.E.O.C. may delegate much of its responsibility for

[11] 42 U.S.C. § 2000e-7 (1974).

[12] 42 U.S.C. § 2000e-8(b) (1974), which provides:

> The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitations of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

handling certain complaints arising in that state to the local agency.

Finally, to insure the systematic involvement of the states in enforcement, the Act set up the deferral requirements. In the case of a private complainant, the Commission is required by Section 706(c) of the Act,[13] to defer such charges to the appropriate state agency for 60 days. During this period, the state agency has the opportunity to begin proceedings to determine whether there has been a violation of its antidiscrimination laws. Only upon the expiration of that deferral period may the E.E.O.C. resume jurisdiction and investigate the charge.[14]

Similarly, in the processing of a Commissioner's charge, as in the instant case, the Congress mandated that the E.E.O.C. afford the State or local agency time in which to make a decision on accepting referral of the charge for local processing. 42 U.S.C. § 2000e-5(d) (1974). In support of the inclusion of these referral provisions in the original version of Title VII, Senator Clark suggested that:

> [T]itle VII meshes nicely, logically, and coherently with the State and city legislation already in existence in a number of the States and a number of our cities, small as well as large. The Federal Government and the State governments could cooperate effectively and, to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and discriminators are prosecuted. 110 CONG. REC. 7205 (1964) (remarks of Senator Clark).

[13] 42 U.S.C. § 2000e-5(c) (1974).

[14] For a comprehensive discussion of the history and implementation of the deferral provisions of the Act, *see generally* Berg, *Equal Employment Opportunity under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964); Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 829-30 (1972).

The Petitioner submits that in the Commission's processing of the instant Commissioner's charge, it has by-passed a Congressionally created system which, *inter alia*, was intended to divert much of the nation's efforts in antidiscrimination enforcement into the State and local arena. As this Court stated in *Miller v. California*, 413 U.S. 15, 33 (1973), wherein it discussed the propriety of state versus federal standards in obscenity legislation: "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolution of imposed uniformity."

Likewise, in the area of criminal procedure, this Court in a series of opinions upheld State variations from the established federal practice of unanimous, 12-person juries. *Johnson v. Louisiana*, 406 U. S. 356 (1972); *Apodaca v. Oregon*, 406 U. S. 404 (1972). In *Johnson, supra*, Justice Blackmun observed in his concurring opinion (406 U.S. at 375) that:

> [I]n the name of uniform application of high standards of due process the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment with adjudicatory processes different from the federal model. . . .

So, too, the failure of the E.E.O.C. properly to refer this Commissioner's charge to the local agency signifies an intent by that agency to arrogate certain types of charges to itself, while depriving the States of the opportunity to apply their local standards and procedures. Such a procedure on the part of the E.E.O.C.

serves to impose the rigid uniformity of national standards in an area of law in which the States have specifically been sanctioned by statute to participate.

B. The Alleviation of the Commission's and the Courts' Enormous Backlog of Cases

Certainly one of the primary purposes for the retention of the deferral provisions in the 1972 version of the Act was to provide the Commission with State and local alternative agencies in order to relieve its burgeoning case load. The E.E.O.C.'s alarming backlog has been the subject of much discussion in Congress and in the Courts.[15]

The problem of the E.E.O.C.'s caseload was a concern of Congress when it held initial hearings before amending the original Act in 1972:

> The Commission has stated, in testimony before this committee, that its caseload has increased even more rapidly than its projections had anticipated. The result . . . has led to lengthy delays in the administrative process and has frequently frustrated the remedial role of the agency. In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 to 3 years before final conciliation procedures can be instituted. . . . H.R. Rep. No. 238, 92d Cong., 2d Sess. 12 (1972).

Nevertheless, the Commission has been remarkably reluctant to take advantage of statutory provisions —

[15] At the swearing-in of former E.E.O.C. Chairman Lowell W. Perry on May 27, 1975, it was confirmed that the backlog of complaints pending at the Commission was "Well over 100,000." 89 Lab. Rel. Rep. 137-38 (1975). More recently, upon assuming the chairmanship of that agency in May 1976, Acting Chairman Ethel Bent Walsh characterized the backlog of over 106,000 cases as "an emergency situation." 93 Lab. Rel. Rep. 1 (1976).

such as deferral — that would enable it to effectively "farm out" portions of its workload to the state agencies. Indeed, the E.E.O.C.'s obvious attempt in the instant case to evade the deferral requirements of the Act can only further aggravate the E.E.O.C.'s already unmanageable caseload.

Other Circuit Court decisions which we submit to be in conflict with the conclusions of the District Court, as affirmed and adopted by the Fourth Circuit, include *General Insurance Co. of America v. E.E.O.C.*, 491 F.2d 133 (9th Cir. 1974); *E.E.O.C. v. Hickey-Mitchell*, 507 F.2d 944 (8th Cir. 1974); *Mitchell v. Mid-Continent Spring Co. of Kentucky*, 466 F.2d 24 (6th Cir. 1972).

The E.E.O.C., we submit, has failed through the Guillory Affidavit — upon which the District Court relied exclusively in reversing its prior Decision and Order — adequately to explain its failure to follow both the law and its procedural regulations. The Commission's contention — that there exists some "longstanding policy" of nonacceptance by the Maryland Commission of E.E.O.C. Commissioner charges — is notably inconsistent with the exchange of letters in September and October, 1974, between the two agencies. Although the E.E.O.C. now claims that this "longstanding" policy obviated the need for a prompt referral, its October 7, 1974 letter to Mr. Gragg (App. 6) belies that contention. While the E.E.O.C. has asserted to the District Court that this so-called "long-standing policy and practice" would require a futile exchange of "form letters," it nevertheless has failed to explain the October 7, 1974 exchange of letters.

The only logical conclusion, we submit, is that the Commission must have suddenly realized that its

failure to follow the statutory referral process might jeopardize the processing of the Commissioner's charge, and that it belatedly sought to cure this oversight through an exchange of letters with the 706 agency and the Company. Even assuming, *arguendo*, the existence of the "long-standing policy and practice" governing the Maryland Commission's refusal to accept referral of E.E.O.C. Commissioner charges, such "policy" exists only as an informal, *unwritten* policy, which can be changed at any time by the Executive Director of the Maryland Commission. It is unavailable to the public through a properly promulgated and published regulation.

This policy should, at the very least, have been subject to the rule-making provisions set forth in the Administrative Procedure Act (hereinafter "the A.P.A."), since it is an abnegation of the dictates of Section 706(d) of the Act, 42 U.S.C. § 2000e-5(d) (1974), and of properly promulgated E.E.O.C. Regulations, 29 CFR §§ 1601.10, 1601.12 (1975). We submit that the use of an unwritten, unpublished custom or practice by which the E.E.O.C. seeks to avoid its statutory and procedural obligations, violates the intent of the applicable provisions of the A.P.A. The "policy and practice" upon which the District and Circuit Courts allowed the Commission to obviate the strict procedural requisites of Title VII were both "rules of procedure" and "statements of general policy;" as such, both were required to be promulgated in accordance with Section 553 of the A.P.A. and published pursuant to Section 552 thereof.

Moreover, nothing in the statute or the regulations contemplates that administrative agency employees should decide whether or not to follow the statutory requirements. Section 706(d) obviously does not require

the State agency to accept the offer of referral, but it does require that the offer be made and that it be made prior to the E.E.O.C. taking any action in respect to the charge. Guillory's affidavit and deposition make clear that the Maryland Commission could have asserted jurisdiction if it had chosen to do so. And the statute and regulations make clear that the State Commission must be given that opportunity to make that decision, irrespective of the feelings and viewpoints of individual agency employees. The hasty, contrived and belated October 7, 1974 exchange of letters between the E.E.O.C. and the Maryland Commission confirms that the obligation to notify existed and had never been abrogated by any so-called "agreement."

As the Court of Appeals for the District of Columbia observed in *Weisberg v. U.S. Dept. of Justice*, 489 F.2d 1195, 1199 (1973), *cert. denied* 416 U.S. 933 (1974), Congress's intent in passing the A.P.A. was to protect the public from being forced to "litigate with agencies on the basis of *secret laws* or incomplete information." (Emphasis added). *See also, Piercy v. Tarr*, 343 F. Supp. 1120 (N.D. Cal. 1972); *Gardiner v. Tarr*, 341 F. Supp. 422 (D. D.C. 1972).

Accordingly, the Petitioner prays that this Court grant its writ of certiorari in order to pass upon this significant problem in the administration of Title VII.[16]

[16] We further submit that the instant case is not governed by this Court's decision in *Love v. Pullman*, 401 U.S. 522 (1972). In *Love*, a private complainant rather than the E.E.O.C. had brought the action which was challenged by the respondent in the District Court. Moreover, in *Love*, although the E.E.O.C. had orally notified the 706 agency — which, that respondent argued, was ineffective notification within the meaning of Section 706(c) of the Act, 42 U.S.C. § 2000e-5(c) (1974) — it nevertheless refrained from taking any action with respect to the charge until after the local agency had terminated its jurisdiction over the charge. The

II.

The Commission's procedures authorizing the same individual to recommend initiation of Section 707 charges, to investigate, conciliate and file suit is contrary to the intent of Congress and in violation of the requirements of the Act.

In the Petitioner's Opposition to the E.E.O.C.'s Motion to Enforce the subpoena here in issue, it challenged and continues to challenge the administrative procedures pertaining to the processing of a Commissioner charge. The basis thereof is that such procedures, as outlined in the E.E.O.C.'s Notice N-916 (App. 8-14) and later in a substantially similar manner in Sections 1601.50 through 1601.59 of its Regulations, promulgated in April, 1975 (*See* App. 49), are violative of the clear language and intent of Title VII.

Prior to 1972, individual charges were processed by the Commission, while so-called "pattern or practice" charges were within the jurisdiction of the Department of Justice. Section 706 of the 1964 Act, 42 U.S.C. § 2000e-4 (1964), governing the processing of individual charges, was administered by the E.E.O.C. in a manner wholly consistent with the principle of separation of functions. Thus, an individual complainant filed a charge alleging some form of prohibited discrimination. The District Office of the Commission which was assigned to investigate the charge would employ staff personal

local agency in *Love* was not only notified, but acted upon the charge. The sole reason for the resumption of E.E.O.C. jurisdiction over that case was that the 706 agency had failed to reach a satisfactory resolution of the matter. In the instant case, on the other hand, the appropriate 706 agency was never given this opportunity to act, and indeed, the E.E.O.C. never afforded that agency the opportunity to assume jurisdiction over the Commissioner's charge before it commenced its investigation of that charge.

responsible only for conducting investigations. Thereafter, if a finding of probable cause was made, conciliation efforts would be made by personnel assigned not to investigate but only to conciliate. Finally, in the event that conciliation failed, the charging party was once again given the task of bringing an action in a United States District Court.

Charges brought under Section 707 of the 1964 Act were processed by the Justice Department. 42 U.S.C. § 2000e-5(a) (1964). The substantial difference between 706 and 707 procedures was that the Justice Department was sanctioned by the Act simply to investigate and, if probable cause was found, to bring a civil action in federal court on behalf of the aggrieved person or persons. Absent was the intermediate step of prelitigation conciliation.

In 1972, however, Congress significantly amended both Sections 706 and 707 of the Act. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1974) afforded the Commission the power, formerly available only to private complainants, to bring a federal civil action on behalf of private claimants. Under the Amendments, the Commission continued its practice of separating the different functions involved in processing individual charges — charge initiation, investigation and conciliation — and established separate regional litigation centers to handle cases brought to trial in the federal courts.[17]

[17] The Commission's Trial Division, discussed in the E.E.O.C.'s *Compliance Manual* (E.E.O.C. General Counsel Manual), par's. 10,010 — 10,160 (1976), consists of five regional litigation centers which are exclusively responsible for conducting direct litigation. The primary duties of that Division are to select cases which, subject to the General Counsel's approval, are to be recommended to the Commission for litigation and to prosecute cases in district court. Compare the Commission's procedure in this case, where the same individuals who have handled each successive preliti-

Section 707 of the Act was also amended in order to turn over to the E.E.O.C. the authority formerly vested in the Department of Justice to bring "pattern or practice" suits.[18] As a prerequisite to a Section 707 "pattern or practice" suit, the Commission must first utilize the charge initiation, deferral, investigation and conciliation procedures that are a prerequisite to individual suits, even though this was not required of the Attorney General under the original Act.

In order to insure that the E.E.O.C. would treat these newly acquired charges in the same manner as it had previously processed individual charges, Congress enacted Section 707(e), 42 U.S.C. § 2000e-6(e) (1974), which directs that:

> "Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. *All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.*" (Emphasis supplied).

It was in this manner, we submit, that Congress manifested its intent that the Commission maintain its 706 procedures — including a careful separation of functions, with emphasis on the conciliation aspects of the Act (*See* Section 706(b), 42 U.S.C. § 2000e-5(b) (1974)), and adherence to the referral requirements, discussed *supra* — in its administration of Section 707 cases.

---

gation stage have the authority to recommend litigation and, indeed, to conduct any such litigation.

[18] *See* Section 707(c), 42 U.S.C. § 2000e-6(c) (1974).

For example, during the Senate debates over the passage of Section 705(b),[19] which delineated the duties and responsibilities of the Commission's General Counsel, Senator Williams made it quite clear that Congress intended that the various procedural stages followed by the E.E.O.C. would remain wholly separate as had continued to be the Commission's practice under Section 706 of the Act:

> [This section] does not give the General Counsel authority over the investigation of charges, [and over] the efforts of the Commission to achieve voluntary conciliation with respondents, except after a [judicial] complaint has been issued, . . .
>
> *The purpose of [Section 705(b)] is to insure that the prosecutorial and decisional functions of the Commission will be firmly separated and to eliminate any lingering notion that the Commission would be involved in a conflict of acting as prosecutor and judge.*

118 CONG. REC. 583 (1972) (remarks of Sen. Williams) (Emphasis added).

Nevertheless, as the facts in this case show, the Commission totally disregarded the express language of the statute and the intent of Congress, as expressed by Senator Williams. Notice N-916 directs the same individual or individuals who fully participated in selecting the Petitioner as the likely perpetrator of a "pattern or practice" of employment discrimination to act as the investigators, the conciliators, and the prosecutors if litigation is commenced.

Title VII has from its inception been a "conciliation" rather than a "litigation" statute. Both Sections 706 and 707 are conciliation oriented, as indicated by the language of the Act and judicial interpretations thereof.

---

[19] 42 U.S.C. § 2000e-4(b) (1974). *See* App. 47.

Section 706(b), 42 U.S.C. § 2000e-5(b) (1974), provides the focus of the Commission's activities:

> [T]he Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .

By its referral to the procedures outlined in Section 706, Section 707(e) mandates a similar emphasis upon conciliatory, *voluntary* settlement of cases brought under that provision.

This Court has itself concluded, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974): "Cooperation and voluntary compliance were selected as the preferred means for achieving [the] goal [of Title VII]" *See also, E.E.O.C. v. Westvaco Corp.*, 372 F. Supp. 985, 988 (D. Md. 1974) ("It would seem abundantly clear from the language of the Act itself that . . . an opportunity for informal resolution of the charges lie[s] at the heart of the statutory scheme behind Title VII. . . .").

Petitioner submits that the Commission's utilization of the same individual or individuals as initiators, investigators and conciliators effectively precludes the achievement of possible future voluntary conciliation. Centralized processing of Section 707 charges is no doubt a rational concept, but the Commission could easily achieve that goal without unfairly prejudicing the rights of the respondent. The prosecutor ought not be the conciliator, and the conciliator should not be the investigator, and the investigator should not be the initiator of the charge. Those assigned to conduct the investigation could easily be assigned out of a central location, as could those assigned to conciliate and those assigned litigation functions. There is absolutely no

justification for consolidating all these functions into one person or office, especially where that person or office is also the representative responsible for recommending the initiation of the Section 707 charge in the first instance.

It is inconceivable that a charge initiator-investigator, actively seeking to build his case against a respondent, can then act as an impartial conciliator. Therefore, by failing to provide an impartial investigator whose function is separate and distinct from the conciliator, the Commission has deprived the Petitioner of any realistic hope of successful conciliation with the Section 707 team in the likely event of its finding of probable cause in the processing of the Commissioner's charge.

Thus, we submit, the Commission's commingling of functions in the same person or persons contravenes both the clear language of the statute and the express intent of Congress, and, more importantly, renders the conciliation provisions of Section 706 of the Act illusory.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

EARLE K. SHAWE,
STEPHEN D. SHAWE,
ARTHUR M. BREWER,
LESLIE R. STELLMAN,
SHAWE & ROSENTHAL,
Sun Life Building,
Charles Center,
Baltimore, Maryland 21201,
(301) 752-1040,
Attorneys for Petitioner.

September, 1976.

APPENDIX TO APPELLANT'S BRIEF NO. 75-2376

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE
Mercantile Bldg. - Rm. 1100
One South Calvert Street
Baltimore, Maryland 21202

PERSON FILING CHARGE: Commissioner John Powell,

THIS PERSON (Check one)
- [ ] CLAIMS TO BE AGGRIEVED
- [ ] IS FILING ON BEHALF OF A PERSON CLAIMING TO BE AGGRIEVED
- [X] IS A COMMISSIONER OF EEOC

TO: Executive Officer
United States Fidelity and Guaranty Company
100 Light Street
Baltimore, Maryland 21202

DATE OF ALLEGED VIOLATION: Continuing
PLACE OF ALLEGED VIOLATION: Baltimore, Md.
CHARGE NUMBER: TM5-0336

NOTICE OF CHARGE OF EMPLOYMENT DISCRIMINATION

(See Notice of Non-retaliation on reverse)

You are hereby notified that a charge of employment discrimination under Section 706 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided hereto.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations (See attachment) requires the preservation of all personnel records relevant to this charge, as described below, until it is resolved.

Because of the Commission's volume of pending work, we are unable to tell you when we can schedule investigation of this charge; we will, however, contact you at the earliest possible date.

BASIS OF DISCRIMINATION — [X] RACE OR COLOR [X] SEX [ ] RELIGION [X] NATIONAL ORIGIN

NATURE OF CHARGE

X	HIRING		DISCHARGE		LAYOFF		RECALL
	WAGES	X	PROMOTION		DEMOTION		SENIORITY
	JOB CLASSIFICATION	X	TRAINING/ APPRENTICESHIP		EXCLUSION		UNION REPRESENTATION
	SEGREGATED LOCALS		REFERRAL	X	QUALIFICATIONS/TESTING		ADVERTISING
X	BENEFITS		SEGREGATED FACILITIES		INTIMIDATION/ REPRISAL		REMEDIAL USE ONLY!
X	TERMS AND CONDITIONS		UNSPECIFIED AND OTHER		OTHER (Specify)		

DATE: 8/21/74
TYPED NAME OF DISTRICT DIRECTOR: Walter H. Dickerson
SIGNATURE: Walter H. Dickerson by BH

EEOC FORM NO. 131 — PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE — RESPONDENT'S COPY

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
WASHINGTON, D.C. 20506

COMMISSIONER'S CHARGE

Pursuant to Sections 706 and 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (Supp. II, 1972), I charge the following organization with unlawful employment practices:

United States Fidelity and Guaranty
26 S. Calvert Street
Baltimore, Maryland 21203

In particular, I charge the Respondent with engaging in the following unlawful employment practices:

1. Refusing and failing to recruit and hire minorities, particularly Blacks and Spanish-surnamed Americans, and women for positions at all levels of respondent company on an equal basis as white males, because of their race, color, sex and national origin;
2. Refusing and failing to assign, promote, transfer and provide equal terms and conditions of employment for minorities, particularly Blacks and Spanish-surnamed Americans, and women on an equal basis as white males, because of their race, color, sex and national origin;
3. Refusing and failing to provide benefits to female employees on the same basis as to male employees because of their sex;
4. Utilizing testing and selection procedures which have a disparate effect on minorities, particularly Black, and Spanish-Surnamed Americans, and female applicants because of their race, color, sex and national origin, and which are not job related;

5. Maintaining training programs which discriminate on the basis of race, color, sex, national origin.

I make these charges against Respondent and all of its branches on behalf of an aggrieved class with a membership which includes, but is not limited to, all persons who have been and who continue to be or might be adversely affected by the unlawful employment practices which I have charged the Respondent with having committed.

Date: 8/16/74

JOHN H. POWELL, JR.,
Commissioner.

Sep. 4, 1974
Re: TBA5-0336

Vernon Wingenroth, Assistant Director
Compliance Division
Maryland Commission on Human Relations
Mount Vernon Building
701 Saint Paul Street
Baltimore, Maryland 21202

Dear Mr. Wingenroth:

Enclosed is a courtesy copy of a Commissioner's Charge alleging a violation of Title VII of the Civil Rights Act of 1964, as amended.

Since it is not a requirement of this Commission to defer for the usual 60 day period, we will proceed with the investigation of this charge as expeditiously as possible.

Very truly yours,

WALTER M. DICKERSON
Director
Baltimore District Office

State of Maryland
Commission on Human Relations

October 3, 1974

Mr. Walter M. Dickerson, Director
EEOC District Office
711 W. 40th Street
Room 210
Baltimore, Maryland 21211

RE: TBA5-0336 Powell v. United States Fidelity and Guaranty

Dear Mr. Dickerson:

Thank you for your courtesy copy of September 4, 1974, notifying us of the above captioned Commissioner charge. This is to inform you that we have received this charge and do not plan any further action regarding this matter.

Sincerely,

Vernon C. Wingenroth
Assistant Director
Central Case Control

October 7, 1974

Mr. Vernon Wingenroth
Assistant Director, Compliance Division
Maryland Commission on Human Relations
Mount Vernon Building
701 St. Paul Street
Baltimore, Maryland 21202

Re: Powell v. United States Fidelity and Guaranty TBA5-0336

Dear Mr. Wingenroth:

On August 16, 1974, the above-referenced Commissioner's Charge was signed. Pursuant to EEOC Procedural Rules, Section 1601.10, I am hereby notifying the Maryland Commission on Human Relations that this

charge has been filed, and am offering to refer this charge to your Commission.

The Commission will allow the Maryland Commission ten (10) days from the date of this letter to request an opportunity to act under its law. If you do not respond affirmatively, the Commission will assume jurisdiction on the eleventh (11th) day from the date of this letter. Should the Maryland Commission desire an opportunity to act on this charge, I would appreciate your prompt notification.

Sincerely,

Walter M. Dickerson
Director
Baltimore District Office

Attachment: Commissioner's Charge

State of Maryland
Commission on Human Relations

October 7, 1974

Mr. Walter M. Dickerson
Director
Baltimore District Office
Equal Employment Opportunity Commission
711 West 40th Street, Room 210
Baltimore, Maryland 21211

Re: Powell v. United States Fidelity and Guaranty
Case No. TBA5-0336

Dear Mr. Dickerson:

Thank you for your letter of October 7, 1974, notifying the Maryland Commission on Human Relations of the above-referenced Commissioner's charge and offering the Maryland Commission an opportunity to act on this charge.

The Maryland Commission will not accept this offer.

Sincerely yours,

ELBERT L. A. GUILLORY
Executive Director

October 7, 1974

Mr. Williford Gragg, President
United States Fidelity and
Guaranty Company
100 Light Street
Baltimore, Maryland 21202

Re: Powell v. United States Fidelity & Guaranty Company, TBA5-0336

Dear Mr. Gragg:

Upon review of the file for the above referenced charge, I have concluded that service of the charge was premature. Therefore, you may disregard service of the charge.

Sincerely,

WALTER M. DICKERSON
Director
Baltimore District Office

cc: Stephen Shawe, Esq.
Shawe & Rosenthal
Sun Life Building
Baltimore, Maryland

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BALTIMORE DISTRICT OFFICE
Mercantile Bldg. - Rm. 1109
One South Calvert Street
Baltimore, Maryland 21202

PERSON FILING CHARGE: Commissioner John Powell, Jr

THIS PERSON (Check one)
- [ ] CLAIMS TO BE AGGRIEVED
- [ ] IS FILING ON BEHALF OF A PERSON CLAIMING TO BE AGGRIEVED
- [X] IS A COMMISSIONER OF EEOC

TO: Executive Officer
United States Fidelity and Guaranty Company
100 Light Street
Baltimore, Maryland 21202

DATE OF ALLEGED VIOLATION: Continuing
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Because of the Commission's volume of pending work, we are unable to tell you when we can schedule investigation of this charge; we will, however, contact you at the earliest possible date.

BASIS OF DISCRIMINATION ——→ [X] RACE OR COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN

NATURE OF CHARGE

X	HIRING		DISCHARGE		LAYOFF		RECALL
	WAGES	X	PROMOTION		DEMOTION		SENIORITY
	JOB CLASSIFICATION	X	TRAINING/ APPRENTICESHIP		EXCLUSION		UNION REPRESENTATION
	SEGREGATED LOCALS		REFERRAL	X	QUALIFICATION/TESTING		ADVERTISING
X	BENEFITS		SEGREGATED FACILITIES		INTIMIDATION/ REPRISAL		REPRISAL (USE THIS ONLY)
X	TERMS AND CONDITIONS		UNSPECIFIED AND OTHER		OTHER (Specify)		

I hereby certify that I mailed the original of this notice to the addressee herein above.

DATE: 10/7/74 EEOC EMPLOYEE (Signature): B. H. Shaffer

EEOC FORM 131 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE FILE COPY

NOTICE

1. SUBJECT. SECTION 707 PATTERN AND PRACTICE CASES

2. PURPOSE. This Notice prescribes procedures for the implementation of Section 707 of Title VII, Civil Rights Act of 1964, as amended.

3. ORIGINATOR. Office of Compliance, Executive Director; and Office of General Counsel. Inquiries may be directed to Associate General Counsel, Trial Division or Director of Compliance.

4. RESPONSIBILITIES.

   a. *Associate General Counsel, Trial Division and Director of Compliance shall;*

      (1) review all recommendations made for proposed pattern or practice respondents;

      (2) jointly recommend to the General Counsel those respondents against whom Commissioner Charges are to be issued; and

      (3) inform the appropriate Regional Directors and Regional Attorneys of designations of Section 707 respondent(s).

   b. *Regional Directors and Regional Attorneys are responsible for:*

      (1) assisting the 707 teams in the selection of respondents for 707 actions;

      (2) providing data on selected 707 respondents (e.g., EEO-1 reports, general compliance history, etc.); and

      (3) designating the district office(s) from which the pattern or practice team will work for each respondent.

   c. *Section 707 Teams,* under the general supervision of the Associate General Counsel, Trial Division, are responsible for

investigating and seeking conciliations of Section 707 cases and for litigating cases when conciliation efforts fail.

5. SELECTION OF SECTION 707 TEAM MEMBERS. Cases will be handled by special teams responsible for pattern or practice enforcement. The Associate General Counsel, Trial Division will designate three or more attorneys from the Office of General Counsel for each Section 707 team, including one senior trial attorney to serve as Team Captain. The Director of Compliance, with advice from the Regional Director, will designate two district office investigators for each team. The appropriate Regional Attorney, Regional Director, or Assistant General Counsel, Headquarters, will arrange for team members to be relieved of all other assignments.

6. STEPS IN SELECTING SECTION 707 CASES.

   a. *Developing Proposed Respondents.* Section 707 Teams, with advice from Regional Directors and Regional Attorneys, will recommend to the Director of Compliance and the Associate General Counsel, Trial Division proposed respondents for Section 707 action. The Teams shall base their recommendation on all available data including District and Litigation Offices' files relating to the respondent, EEO-1 report(s) and general compliance history of respondent(s). Respondents should, when feasible, be those with large numbers of charges pending against them. Each proposed respondent will be forwarded by a presentation memorandum detailing information of respondent's practices, reason(s) for selecting the respondent and some indication of the scope of a possible suit. See Exhibit 1 for an outline of the content of the presentation memorandum. The presentation memorandum also should identify charges pending

against the proposed respondent along with their bases and issues, and indicate which charges seem appropriate for inclusion in the 707 investigation and processing. Appropriate Commissioner Charges also should be included for signature in the package recommending pattern or practice actions. The package should be forwarded to the Associate General Counsel, Trial Division for review. Following review, the Associate General Counsel will forward the package to the Director of Compliance for review, prior to a final recommendation to the General Counsel.

b. *Referring Selected Cases to Commissioners.* To ensure that pattern or practice actions have the broadest possible scope, Section 707 cases will be initiated by a Commissioner Charge. The General Counsel will forward the charge and supporting data to the Commission for signature by a Commissioner.

c. *Notifying the Section 707 Team, Regional Director, and Regional Attorney.* When the charge is signed, it will be immediately forwarded by the General Counsel to the Team Captain, with notification of such action sent by the Director of Compliance to the appropriate Regional and District Offices. After appropriate review, the team captain shall notify the District Office(s) as to which of the pending charges will be included in the 707 processing and those to be retained in the District Office(s) for normal processing. The district office will suspend processing of the charges to be included in 707 cases and will transmit them and all files to the Team Captain. For those charges retained in the District Office for normal processing, final conciliation proposals shall be sent to the Team Captain for review prior to signing.

d. *Designation of District Officer for 707 Cases.* Concurrent with the signing of the Commissioner charge, the Director of Compliance, with the concurrence of the Regional Director and Associate General Counsel, will designate a district office for the pattern or practice charge.

7. PROCESSING SECTION 707 CHARGES. The team captain will transmit the charge to the Director of the designated District Office. The District Director shall follow the filing and deferral procedures as set forth in 29 CFR 1601.10 *et sec.*, immediately serving notice to the Respondent pursuant to 29 CFR Sec. 1601.13 and immediately notifying the appropriate State or local deferral agency as defined in Sec. 1601.12(c) allowing that authority 10 days within which to request an opportunity to act under its law pursuant to Sec. 1601.01.

Immediately upon issuance of all appropriate notices, and without timely responses from the appropriate deferral agency, the team under the direction of the Team Captain shall begin its investigation.

In the event it becomes necessary for the team to enforce its request for information through the Commission subpoena authority, the Team Captain shall prepare the necessary papers for signature by the Director or Deputy Director of the designated District Office pursuant to 29 CFR Section 1601.15 and Section 24 of the Compliance Manual. The District Director or Deputy Director shall not refuse to issue any subpoena requested by the Team Captain. Petitions to revoke and enforcement of subpoenas will be handled in accordance with the provisions of Section 24 and 29 CFR 1601.15, provided however, that prior to final determination pursuant to Sec. 24.4(b), the Director of Compliance shall confer with the Associate General Counsel, Trial Division.

Upon completion of the investigation, the Team Captain shall transmit to the General Counsel a report of the investigation and a draft Commission Decision. Within 5 working days, the General Counsel shall transmit these materials, as modified if necessary, to the Director of Compliance, who shall either transmit these materials to the Commission or recommend any changes to the General Counsel. If the General Counsel and the Director of Compliance cannot agree on all terms of the draft Commission Decision, each shall transmit his recommended decision and, if appropriate, substitute alternative language, along with an explanatory memorandum detailing the reasons for the disagreement to the Commission. The Commission, on the basis of the investigative report and the accompanying materials submitted by the General Counsel and the Director of Compliance, shall determine whether there exists reasonable cause to believe that the respondents have engaged in a pattern or practice of unlawful discrimination within the meaning of Section 707(a) of Title VII. The Commission Decision shall then be signed by the Director of Compliance.

A finding of no reasonable cause shall constitute a dismissal of the charge, and the Team Captain shall promptly notify the respondent(s) of the Commission action.

A finding of reasonable cause by the Commission authorizes the General Counsel, through the Team and its Captain, to endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation and persuasion as provided by Section 706(b) of Title VII, as amended. If conciliation fails, the Team Captain shall notify the Director of the designated District Office, who shall in turn notify the respondents pursuant to 29 CFR Sec. 1601 *et sec.* Upon issuance of notice of conciliation

failure, the team shall promptly prepare a presentation memorandum containing its recommendations as to litigation and shall forward it, together with the case file, to the General Counsel for review. If the General Counsel concludes that litigation is advisable, he shall forward the presentation memorandum and the case file to the Commission with the recommendation that suit be authorized. If a majority of the Commission votes to authorize suit, the General Counsel shall transmit the case file to the team with instructions to initiate suit.

8. RESOURCE ALLOCATIONS. When a team is assigned more than one respondent, each case will be processed concurrently by the team out of the District Office designated for each respondent.

District Directors of designated district offices will provide one clerical to work with the 707 team and shall provide space and other administrative support for on-site work of the 707 team. In unusual circumstances, Regional Directors and Regional Attorneys may make alternative arrangements which are mutually satisfactory (e.g., use of Regional or Litigation Office and/or staff). District Directors and Regional Attorneys (or Assistants General Counsel) will maintain time and attendance records, WMS reports, and other records/reports for their own respective personnel.

The Director of Compliance will designate a member of his staff to serve as a Compliance Coordinator for 707 activities. The Coordinator will represent the Director of Compliance as appropriate to ensure full coordination of the 707 effort. The investigators will work under the direction of the Team Captain.

The Regional Director will recommend Annual (Blanket) Travel Authorization for investigators assigned to Section 707 Teams. The Authorization will cover travel to any area required for the

performance of duties relating to Section 707 action. The Executive Director will approve the blanket travel authorization and forward it to the Chief, Financial Management Division.

At the request of the Team Captain, District Directors will issue travel requests for their own respective personnel, using the blanket travel authorization assigned the team member as their source of authority.

Approved _____ _____
General Counsel — Director, Office of Compliance

_____
Executive Director

_____

April 21, 1975

Honorable Herbert Murray
Judge, United States District Court
for the District of Maryland
United States Court House
Baltimore, Maryland 21202

Re: *E.E.O.C.* v. *U.S.F.&G.*
Civil Action No. HM-75-366

Dear Judge Murray:

I have received and reviewed the supplemental letter, with attached documents, submitted to you by counsel for the EEOC in connection with the April 17 hearing in the above-entitled case. This letter, and these documents, make perfectly clear what I argued to you yesterday, that the EEOC has violated its statutory mandate by instituting action with respect to the Commissioners Charge of August 21, 1974 without first deferring to the Maryland Commission on Human Relations or the Baltimore Community Relations Commission. The undisputed facts show the following:

1. Chairman Powell's Commissioners Charge, under Section 707 of the Civil Rights Act, was filed on August 21, 1974 and served immediately upon U.S.F.&G.

2. The EEOC's investigatory machinery was immediately set in motion, as demonstrated by Ms. McGovern's letter of August 21, 1974 to Mr. Gray (sic) of U.S.F.&G. A copy of that letter is attached hereto. In addition to certain documents and materials, Ms. McGovern proposed to conduct interviews at certain of U.S.F.&G.'s field offices (see attached letter, page 3). Such investigatory interviews were in fact conducted in New Orleans, Louisiana on September 10, 1974 and in Dallas, Texas on September 12, 1974. In addition, EEOC personnel conducted investigatory interviews of Company personnel at U.S.F.&G.'s home office in Baltimore on September 16, 1974.

3. By letter dated September 4, 1974 (attached to the EEOC's letter to you), EEOC District Director Dickerson forwarded to Maryland Commission on Human Relations Assistant Director Wingenroth "a courtesy copy" of the August 21 Commissioners Charge, informed Mr. Wingenroth that deferral "is not a requirement of this Commission," and announced that the EEOC "will proceed with the investigation of this charge as expeditiously as possible."

4. By letter dated October 3, 1974 (attached to the EEOC's letter), Mr. Wingenroth thanked Mr. Dickerson for "your courtesy copy of September 4" and informed him that "we have received this charge and do not plan any further action regarding this matter." This latter statement would appear to be somewhat gratuitous, since the EEOC had already told the Maryland agency that there was nothing for the Maryland agency to do since the EEOC was proceeding "as expeditiously as possible" with its investigation of the Commissioners Charge against U.S.F.&G.

Thereafter, it finally occurred to the EEOC that it had made a shambles not only of its own regulations regarding deferral but also of the express statutory mandate of Section 706(d) which requires that, upon the filing of a charge, "the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials" for the purpose of deferral. See also Section 707(e), which imposes this

deferral requirement upon the EEOC in the case of a Commissioners Charge under Section 707. The EEOC then sought to take corrective action, as follows:

5. By letter dated October 7, 1974, District Director Dickerson informed U.S.F.&G.'s president to "disregard service of the [August 21] charge" because he had "concluded that service of the charge was premature" (Exhibit J, attached to U.S.F.&G.'s Memorandum to the Court).

6. That same day, October 7, Mr. Dickerson directed a letter to Mr. Wingenroth of the Maryland Commission, purporting to notify him that the previously-filed Commissioners Charge had been signed and "offering to refer this charge to your Commission" (letter attached to EEOC's Memorandum in Response, dated April 17, 1975).

7. In a letter dated that very same day, October 7, Executive Director Guillory of the Maryland Commission responded to Mr. Dickerson's letter, acknowledging his letter and announcing that the State Commission "will not accept this offer" (letter attached to EEOC's Memorandum). That letter was received by the EEOC's District Office on October 8, 1974 at 12:53 P.M., according to the time/date stamp.

8. On October 8, Mr. Dickerson re-served the August 21 Commissioners Charge (attached to EEOC's letter of April 17).

* * * * * *

The extended chronology set forth above demonstrates plainly, we submit, that the EEOC, belatedly recognizing its clear violation of both the statute and its regulations, sought to rectify this failure to defer by engaging in a sham. This is further demonstrated by the statements of EEOC counsel at the hearing on April 17. At that time, EEOC counsel for the first time informed the Court and counsel for U.S.F.&G. of the EEOC's September 4 letter to the Maryland Commission and of the latter's response (see paragraphs 3 and 4, above). But while EEOC counsel sought to characterize these letters as an offer to defer and a reasoned

response, the fact is that the EEOC's letter of September 4 did not constitute any kind of deferral at all. To the contrary, the EEOC told the State agency in that letter that it had no obligation to defer the matter and that it (i.e., the EEOC) was proceeding to investigate the charge "as expeditiously as possible."

EEOC counsel also stated to the Court that the reason the Maryland Commission could respond so quickly to the October 7 letter — we respectfully invite the Court's attention to the fact that the State agency responded to the October 7 letter before it could possibly have received that letter through the mails — was that it had already reached a decision as a result of the previous September 4 letter. That explanation, we submit, is a logical impossibility.

What this comes down to is that, to this very day, there has never been compliance by the EEOC with the deferral mandate of the statute. There has never been a meaningful opportunity — indeed, there has been no opportunity at all — for any agency other than the EEOC to handle the Commissioners Charge in Case No. TBA5-0336. Since there are two deferral agencies having jurisdiction over U.S.F.&G. — the State agency and the Baltimore Community Relations Commission (see EEOC Procedural Regulations, Sec. 1601.12 (m)) — the violation of the statutory mandate of Section 706(d) is manifest.

This violation is not cured, we submit, by characterizing it as an "administrative oversight," to use the words of EEOC counsel. Nor is the violation cured by the EEOC's unseemly attempt to foist off, on the Court and the respondent, a meaningless exchange of letters as a meaningful and timely deferral.

There having been a clear violation of the statute, and we do not understand the EEOC to argue otherwise but only to characterize it as an administrative oversight which prejudiced no one, we submit that the invalidity of the EEOC's actions since August 21, 1974 are clear and should be remedied. *Leedom v. Kyne*, 358 U.S. 184 (1958); and see from this District the *Firestone, Westvaco, Western Electric* and *Raymond Metals* cases

cited in our Memorandum to the Court, and in addition the recently decided *Corne* case cited also in our Memorandum.

I would close by reiterating what was said at the hearing with regard to prejudice. Respondent need not show prejudice to prevail in this matter, as the cases cited above demonstrate. But prejudice exists, as we have shown. For U.S.F.&G. has had a long and successful course of dealing with the Baltimore Community Relations Commission, and had an offer to defer been made to that agency, it is possible that it would have accepted the deferral and would have attempted to conciliate the matter with the Company.

But we cannot reconstruct the past; and we do not know what would have happened if the EEOC had done what it was supposed to do. We contend, simply, that the onus for nonperformance must fall on the EEOC.

Respectfully submitted,

SHAWE & ROSENTHAL
STEPHEN D. SHAWE

SDS/gl
Enclosures
cc: Katherine Savers McGovern, Esq.

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(2) ORAL OPINION

April 24, 1975

(The Court) I have reached a decision in this matter, and I would like to give a bench opinion with regard to it, reserving the right to edit the opinion in non-essential particulars by way of punctuation, or phraseology should this matter go beyond this forum, without altering the substance of the opinion.

On Thursday, April 17, 1975, this Court heard oral argument on the Equal Employment Opportunity Commission's application for an Order to show cause why a subpoena should not be enforced. I took the matter sub curia so that I might give full consideration to the issues raised and the authorities cited at that

time. I have asked counsel to reconvene today to give my ruling on the motion presented.

The present controversy arises by virtue of an investigation being conducted by the applicant in connection with a Commissioner's charge against respondent, United States Fidelity and Guaranty Company, pursuant to Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, 42 United States Code Section 2000e et seq., as amended by Public Law 92-261, 86 Stat. 103 (March 24, 1972). It appears from the Supplemental Affidavit of Walter M. Dickerson, the Director of the EEOC's Baltimore District Office, that the Commission's Chairman, John Powell, Jr., signed the Commissioner's charge on August 16, 1974. Five (3) days later, on August 21, 1974, the so-called Powell charge was filed with the Baltimore District Office of EEOC and a copy of this charge, together with a 131 Notice, were handserved on respondent that same date.

By letter dated September 4, 1974, Mr. Dickerson communicated the fact of this charge to a Mr. Vernon Wingenroth, Assistant Director in the Compliance Division of the Maryland Commission on Human Relations. The text of this letter was as follows:

> "Enclosed is a courtesy copy of a Commissioner's charge alleging a violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> "Since it is not a requirement of this Commission to defer for the usual 60 day period, we will proceed with the investigation as expeditiously as possible."

Prior to this letter of September 3rd, however, correspondence was directed by Ms. McGovern, an attorney and team captain in the EEOC's Office of the General Counsel, to a Mr. Williford Gray, actually Gragg, respondent's Chief Executive Officer, disclosing the intentions of EEOC with respect to the impending investigations and making certain (4) requests for the production of copies of numerous charts, documents and materials.

It has also been brought to the Court's attention, by way of letter from respondent's counsel, Mr. Shawe, dated April 21, 1975, that the EEOC did in fact conduct certain investigatory interviews at certain U.S.F. & G. offices during the month of September; namely, at the field offices in New Orleans, Louisiana and Dallas, Texas on September 10th and 12th respectively, and at the home office in Baltimore on September 16th.

Thereafter, on October 3, 1974, the Maryland Commission on Human Relations sent a letter to the EEOC's Baltimore office, thanking Mr. Dickerson for the courtesy copy of the Commissioner's charge, and informing the district director that the Maryland commission did "not plan any further action regarding this matter."

The next event of significance occurred on October 7th when, according to Mr. Dickerson's affidavit, he concluded, upon reviewing the Powell file, "that service of the charge had been premature," whereupon he sent Williford Gragg, President of U.S.F. & G., a letter "advising him to disregard service." This letter was attached to Mr. Dickerson's affidavit and marked Exhibit E.

On this same date, Mr. Dickerson sent a second letter to the Maryland Commission on Human Relations, the text of (5) which varied markedly from the prior notification letter of September 4th. In the October 7th correspondence, the State commission was advised on the Commissioner's charge and was offered the deferral of this charge. Furthermore, apparently pursuant to the directives expressed in the EEOC's Notice N-916, specifically the seventh section thereof, the State Commission was notified that it would be allowed a period of ten days to assume jurisdiction over the charge, and that if it failed to do so, the EEOC would assume jurisdiction. Mr. Dickerson's affidavit recounts that this letter of notification and deferral was hand-delivered.

That same day, a Mr. Guillory, the Executive Director of the Maryland State Commission on Human Relations, wrote Mr. Dickerson, informing him that the

State commission was not accepting his offer of deferral.

Subsequently, on October 8th, Mr. Dickerson sent a second notice of the Commissioner's charge to Mr. Gragg.

With this factual background as a frame of reference, it is clear to the Court that the notification and deferral action of the EEOC in August and September of 1974 was defective and could not have constituted a satisfactory basis for the exercising of investigatory powers afforded under Title VII of the Civil Rights Act of 1964, as amended.

The applicant has, in part, urged this Court to view the notification provisions of 42 U. S. C. 2000e-5(d), the (6) applicable provisions by virtue of the express terms of Section 2000e-6(e) of Title 42, as discretionary rather than mandatory. As authority for this proposition, applicant's counsel has directed the Court's attention to footnote number 11 of Chief Judge Northrop's opinion in *EEOC v. Raymond Metal Products Co.*, 8 FEP 1199 at 1206 (D. Md. 1974). While the Court is in firm agreement with the Chief Judge's observation that there is a marked difference between the referral provisions applicable to Commission charges and aggrieved party charges, as found respectively in subsections (d) and (c) of Section 2000e-5, it cannot accept the inference drawn by the EEOC from the language used by the Court in the *Raymond Metal* case. Subsection (d) by its very terms makes notification mandatory.

In relevant part, the statute reads:

> "the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials."

Of course, referral under subsection (d) need only be made when specifically requested by the State or local agency, unlike the mandatory referral provisions of subsection (c); however, notification of the charge is mandatory before any EEOC action may be taken with respect to such Commission charge.

(7) In the instant matter, the attempt at notification was, in this Court's opinion, nothing more than a mere courtesy and as such did not constitute the type of notification envisioned by the statute. See *Corne v. Bausch & Lomb, Inc.,* 10 FEP cases 289 at 291 (D. Ariz. 1975).

The purpose for the notification provision of subsection (d) of Section 2000e-5, in this Court's estimation, is to apprise the State or local agency of the pendency of a charge and to afford such agency a meaningful opportunity to decide whether or not it will exercise its lawful right to act under its State or local law to remedy the practices alleged.

Under the facts of this case, as was the situation in the *Corne* case, the EEOC had already assumed jurisdiction of the charge and was simply going through the motions, if you will, as prescribed by the statute. This is indeed, in the Court's view, a clear violation of the intent and direction of the statute. Therefore, it is clear that these attempts at investigation of the Commissioner's Charge vis-a-vis the *Crawley* Title VII claims, which relied on such notification as their matrix, must of necessity be deemed ineffective and, therefore, unenforceable.

What has occurred in the instant matter, however, is that the EEOC has attempted to cure the initial defective handling of the Commissioner's Charge. Mr. Dickerson's (8) letter of October 7, 1974, to Mr. Gragg of U. S. F. & G., Exhibit E of the former's affidavit, was, in effect, an effort on the part of the EEOC to clean the slate, as it were, and start anew the notice of charge mechanism. The specific issue before the Court, therefore, becomes whether or not such actions do, in fact, constitute a purging of the prior procedural error, thereby permitting the EEOC to proceed with its investigative efforts on the basis of the October letters of notification of charge and offer of deferral.

The law in this circuit is clear that governmental agencies must comply with their own regulations, at least where those regulations are intended primarily to confer important procedural rights. See *United States v. Heffner,* 420 F.2d 809 at 811 (4th Cir. 1969). For authority for the proposition that the deferral procedures of Title VII confer important procedural rights, one need look no further than the regulations governing the procedures to be followed by the EEOC, specifically 29 Code of Federal Regulations, Section 1601.12. As stated therein, it is the intent of the Commission to encourage through deferral the maximum degree of effectiveness in the State and local agencies. The adoption of these regulations shows a clear and consistent understanding on the part of the EEOC of the statutory requirements of Title VII and the congressional (9) intent manifested in its enactment. See *EEOC v. Westvaco Corporation,* 372 F. Supp. 985 at 988 (D. Md. 1974). The clear intent of Congress is that civil rights complaints of this nature should be resolved as expeditiously and simply as possible on the administrative level, see *Corne v. Bausch & Lomb, Inc.,* cited previously, and where there exists concurrent jurisdiction between the federal and State authorities, the latter should be given a meaningful opportunity to assert its jurisdiction to remedy the alleged wrongful employment practices. As stated by Judge Blair in the *Westvaco* case, the Commission must be held to a higher standard of compliance with the requirements of Title VII and its own regulations than is a private suitor. 372 F. Supp. at 991.

Of course, the EEOC would undoubtedly contend in this Court, as it did in *Westvaco,* that due to the fact that Title VII is remedial legislation, it is entitled to liberal construction. However, this Court is in total agreement with the statements of Judge Blair as follows:

> "Liberal construction is not the equivalent of license. In short, there is nothing about the principles of liberal construction that would justify the Court's rewriting an act of Congress and (10) nothing that would permit the EEOC to flout essential particulars of Title VII and its own regulations promulgated pursuant thereto. 372 F. Supp. at 991."

Section 2000e-5(d) of Title 42 U. S. C. expressly provides that before taking any action with respect to a Title VII charge, the Commission shall notify the appropriate State and local officials of the charge. The record is clear that in this matter, prior to the attempted correct method of notification and offer of deferral, the EEOC engaged in rather intensive investigative efforts. Clearly, investigation constitutes any action within the meaning of the statute.

The only rational conclusion which the Court can make from the sequence of events in this matter is that the EEOC had assumed jurisdiction of the Commissioner's Charge in August, 1974. This conclusion is buttressed by the very language used by the EEOC in its September 4 letter to the Maryland Commission on Human Relations. Mere notification of a charge, without more, is certainly not the intent behind the notification provisions of Section 2000e-5(d). The intent of this provision is clear: it is to afford the State or local agency a meaningful opportunity to determine whether or not it desires to make a request for (11) deferral. To permit the type of notification which existed in this matter to suffice would clearly be to exalt form over substance in disregard of the legislative purpose and intent.

Moreover, the fact that the EEOC attempted to cure this defect in October is without significance in light of the fact that it had already taken investigative action in this case prior to the October notification. This was clearly contrary to the express mandate of the statute.

In making this determination, the Court is, of course, relying on what one might generally categorize as a technical formality. However, the basis for the Court's determination is not the mere breach of this formal requirement by the EEOC, but, rather, the effect of this breach on the legislative purpose and intent inherent in Section 2000e-5(d). The actions of the EEOC from August through October demonstrate that for all intents and purposes, the deferral offer of October was meaningless. The Human Relations Commission had been advised in September that the notification was a

mere courtesy and that the EEOC intended to proceed with the investigation as expeditiously as possible. This effectively rendered moot any decision by the State or local agency with respect to the charge. In light of this action by the EEOC, it is impossible for the Court to conclude that the October notification and offer was (12) anything more than a mere formality, which in no way provided the State commission the requisite meaningful opportunity for decision as to deferral. The Court can only conclude that the State agency was divested of any meaningful opportunity of decision on this matter by the actions of the EEOC in September and that the prior taint carried over to the notification of October 4th. Such conclusion, of course, is inferentially supported by the fact that within a matter of hours, at best, the Commission responded to the offer of deferral. Such decision can hardly be said to be the product of a meaningful opportunity to make such consideration.

Therefore, it is the opinion of the Court that the investigative efforts of the EEOC are legally insupportable due to the fact that Commission violated the statutory mandate of 42 U.S.C., Section 2000e-5(d), and, therefore, the applicant's application for a subpoena is denied.

* * * * * *

I hereby certify that the foregoing is a true and accurate transcription of the Oral Opinion of the Court in the aforementioned matter.

Alfred A. Betz
Official Court Reporter

United States District Court
for the
District of Maryland

Civil Action No. 75-366HM

Motion for Relief From
Order Under Rule 60

Equal Employment Opportunity Commission,
Applicant,

v.

United States Fidelity and Guaranty
Company,
Respondent.

Pursuant to Rule 60(b), Federal Rules of Civil Procedure, the Equal Employment Opportunity Commission (hereinafter "EEOC") moves the Court for relief from its Order of April 28, 1975, for the reasons specified in the accompanying Memorandum in Support of Rule 60 Motion and Affidavit of Elbert L.A. Guillory, Executive Director, Maryland Commission on Human Relations.

Respectfully submitted,

JULIA P. COOPER
General Counsel, Acting
WILLIAM L. ROBINSON
Associate General Counsel
DAVID W. ZUGSCHWERDT
Assistant General Counsel
VINCENT A. FULLER, JR.
KATHERINE SAVERS MCGOVERN
Attorneys
Office of the General
Counsel
Equal Employment
Opportunity Commission.

Of Counsel
VALERIE OLSON
District Counsel
Equal Employment
Opportunity Commission

United States District Court
for the
District of Maryland

Civil Action No. 75-366HM

Memorandum in Support
Of Rule 60 Motion

Equal Employment Opportunity Commission,
Applicant,

v.

United States Fidelity and Guaranty
Company,
Respondent.

On April 24, 1975, the Court issued an Oral Opinion[1] by which it denied the EEOC's request that an administrative subpoena be enforced for the following reasons: 1) the EEOC had taken action, i.e., commenced the investigation, on the *Powell* v. *USF&G* Charge[2] before proper notification to the Maryland Commission on Human Relations offering referral, and before receiving a response therefrom; 2) the EEOC's October Notice to the Maryland Commission on Human Relations offering referral did not afford the Maryland Commission a "meaningful" opportunity to assume jurisdiction; 3) by these actions, the EEOC violated

[1] The transcript of the Oral Opinion was received by undersigned counsel on May 20, 1975.

[2] The EEOC, by presenting the arguments herein, does not waive its contention that the *Powell* Charge was not before the Court, and that only the enforcement of the *Crawley* subpoena was before the Court.

Section 706(d) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(d), and EEOC Procedural Regulations Section 1601.10, 29 C.F.R. 1601.10; 4) since the EEOC violated the Act and its Procedural Regulations, the Commissioner's Charge is invalid; 5) in view of the invalidity of the Commissioner's Charge, the *Crawley* subpoena would not be enforced.

As is established by the attached affidavit of Elbert L.A. Guillory, Executive Director, Maryland Commission on Human Relations, the actions taken by the EEOC were entirely consistent with the policy agreement, between the Maryland Commission and the EEOC, that the Maryland Commission would not accept any referral of charges filed by a Commissioner of the EEOC. Mr. Guillory's affidavit makes clear that the EEOC's immediate commencement of the investigation of the *Powell* charge was entirely proper and appropriate in light of the long-standing practice and policy existent between the EEOC and the Maryland Commission.

Federal Rule of Civil Procedure 60(b) provides the Court with broad discretion to vacate a judgment whenever such action is appropriate to accomplish justice. *United States v. Cato Brothers,* 273 F.2d 153 (4th Cir. 1959), *cert. denied* 362 U.S. 927 (1960). In *Cato Brothers,* the Fourth Circuit adopted the liberal spirit of interpretation of Rule 60(b)(6) which had been established by the Supreme Court in its decision, *Klapprott v. United States,* 69 S. Ct., 384, 335 U.S. 601 (1949). There the Supreme Court found that subsection (6) of Rule (b) should not be limited to relief ordinarily allowable under common law practice, but should be invoked whenever such action was appropriate to accomplish justice. See also, *Chicago & E.I.R. Co. v. Illinois Central R.R. Co.,* 261 F. Supp. (N.D. Ill., 1966); *U.S. v. Edell,* 15 F.R.D. 382 (S.D. N.Y. 1954); *Smith v. Jackson Teel and Die, Inc.,* 426 F.2d 5 (3rd Cir. 1970).

The EEOC urges the Court to reconsider its decision denying the EEOC's petition for enforcement of its administrative subpoena in light of the facts brought

before the Court in the Guillory affidavit. Mr. Guillory's affidavit clearly establishes that the actions of the EEOC with respect to the referral of the *Powell* Charge in no way inhibited, discouraged, or otherwise prevented the Maryland Commission from accepting referral. The Maryland Commission, as a matter of long-standing policy and practice, has determined that it will not expend its resources on charges filed by a Commissioner of the EEOC. The Fifth Circuit applied equitable considerations in reaching its decision in *Smith v. Jackson Tool and Die, supra,* by considering both the lack of prejudice to the defendant and the prejudice to the plaintiff which would result from its failure to vacate the judgment. The Court determined that the interest of ruling on a motion on the merits outweighed the interest in orderly procedure and the finality of judgments. The Second Circuit has also adopted a flexible approach based upon the broad discretion provided the Courts to achieve the ends of justice which underscores the purpose of Rule 60(b). *United States v. Karahalias,* 205 F.2d 331 (2nd Cir. 1953). See also, *Chicago & E.I.R. Co. v. Illinois Central R.R. Co., supra; Weilbacher v. United States,* 99 F. Supp. 109 (SDNY 1951); *United States v. Cato Bros., supra; Klapprott v. United States, supra.*

Without doubt, the Court has ample authority for vacating its Order and ruling that the EEOC's actions with respect to the referral of the *Powell* charge were consistent with the spirit of Title VII and the EEOC Procedural Regulations. Since these actions were consistent, the statutory and procedural requirements were met with respect to the *Powell* Charge. No more is required to sustain the propriety of the EEOC's assertion of jurisdiction. *Love v. Pullman Co.,* 404 U.S. 522 (1972). For these reasons, the EEOC respectfully requests that the Court vacate its Order of April 24,

1975, and enter an Order requiring USF&G to comply with the *Crawley* subpoena.

JULIA P. COOPER
Acting General Counsel

WILLIAM L. ROBINSON
Associate General Counsel

DAVID W. ZUGSCHWERDT
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Office of the General
Counsel
Equal Employment
Opportunity Commission

Of Counsel
VALERIE OLSON
District Counsel
Equal Employment Opportunity
Commission

United States District Court
for the
District of Maryland

Civil Action No. 75-366HM

Affidavit of Elbert L.A. Guillory

Equal Employment Opportunity Commission,
Applicant,
v.
United States Fidelity and Guaranty Company,
Respondent.

I, Elbert L.A. Guillory, being duly sworn in my oath depose and say:

1. I make this Affidavit in support of the "Motion for Relief from Order Under Rule 60" which is being filed concurrently with this Affidavit by the Equal Employment Opportunity Commission (hereinafter "EEOC").

2. I make this Affidavit on the basis of my own personal knowledge.

3. I am the Executive Director of the Maryland Commission on Human Relations, (hereinafter "MCHR") Baltimore, Maryland. As such, I am the custodian of the MCHR's investigative files which relate to charges filed with or referred to the MCHR. I am responsible for establishing and implementing liaison and working relationships with other governmental entities, whether federal, state or local, which have responsibility for the investigation and implementation of laws, regulations and ordinances prohibiting discriminatory employment practices based upon race, sex, color, national origin and religion. Specifically, I

am responsible for liasion with the Equal Employment Opportunity Commission and frequently communicate, both verbally and in writing, with Walter Dickerson, the District Director, EEOC District Office, Baltimore, Maryland, concerning charges which have been received by EEOC or MCHR.

4. It has been and continues to be a long standing policy and practice of the MCHR to decline all EEOC offers of referral which involve a charge filed by a Commissioner of the EEOC. A primary reason for this MCHR policy and practice is the determination that MCHR's resources will be focused on charges received by MCHR, particularly those filed by MCHR Commissioners. I have reviewed the MCHR records and have found that MCHR has never accepted an EEOC offer of referral on an EEOC Commissioner's Charge. I am, and have been, aware that MCHR has the prerogative to accept an EEOC offer of referral of an EEOC Commissioner's Charge. The staff of MCHR is similarly aware of MCHR's right in this regard.

5. I have been advised of the Court's Decision in this proceeding wherein the Court expressed disapproval of the EEOC's referral actions with respect to the *Powell v. USF&G* Charge. The actions taken by EEOC coincidental to referring the *Powell* charge to MCHR were entirely consistent with the understanding and practice which has been established between EEOC and MCHR, i.e., to proceed with the investigation of an EEOC Commissioner's Charge, because MCHR will not accept an offer or referral on an EEOC Commissioner's Charge.

FURTHER, Affiant saith not.

ELBERT L. A. GUILLORY
Executive Director
Maryland Commission on
Human Relations

CERTIFICATE OF SERVICE

The undersigned EEOC Investigator hereby certifies that copies of the "Motion for Relief from Order Under Rule 60", the "Affidavit of Elbert L.A. Guillory", and the "Memorandum in Support of Rule 60 Motion" have been forwarded, via first class, United States Postal Service Mail, to the counsel of record for Respondent, United States Fidelity and Guaranty Company, on 4th day of June, 1975, in the City of Baltimore.

JODY MARTEN

October 31, 1975

(1) ORAL OPINION

(The Court) The Court is prepared today to give its decision on petitioner's motion for relief from order under Rule 60 and motion for enforcement of subpoena, having heard oral argument on Friday, October 24.

Briefly, this matter began on September 23, 1974, when Edgar C. Crawley, Sr., filed a charge with the Maryland Commission on Human Relations which alleged unlawful employment practices by the United States Fidelity and Guaranty Company, respondent here. The Crawley charge was referred to the EEOC and was received on September 30, 1974. Jurisdiction over the Crawley charge was assumed by the EEOC on December 2, 1974, and notice was served on respondent. Respondent refused to comply and, on March 26, 1975, the EEOC filed an application for an order to show cause why the Commission's subpoena should not be enforced. On April 17, 1975, the Court head oral argument on the subpoena enforcement motion, and on April 24, 1975, by oral opinion, denied the Commission's motion.

Thereafter, on June 4, 1975, the Commission filed a motion for relief from order under Rule 60 and related pleadings. On June 16, 1975, respondent filed an opposition to the Commission's motion for relief under Rule 60. On June 26, 1975, the EEOC appealed to the

United States Court of Appeals for the Fourth Circuit from this Court's order (2) denying subpoena enforcement.

Subsequently, by letter dated July 28, 1975, the Court advised counsel that, "I would indeed be disposed to rule in favor of the Equal Employment Opportunity Commission and vacate my prior order signed April 28, 1975, in which I denied the petition to enforce subpoena duces tecum for the reasons set forth in the Court's Oral Opinion of April 24, 1975."

The letter went on to state, "As is apparent from the Court's Oral Opinion, the basis for denying the above petition was essentially that the Commission, through its investigative efforts and the manner in which it attempted to comply with the referral provisions of 42 USC 2000e-5(d), had not provided to the Maryland Commission on Human Relations the requisite meaningful opportunity for decision as to referral.

"Attached to its motion for relief under Rule 60, the Commission has now informed the Court, through the affidavit of Elbert L. A. Guillory, the Executive Director of the Maryland Commission on Human Relations, that it has been and continues to be a long-standing policy and practice of the State Commission to decline all EEOC offers of referral which involve a charge filed by a Commissioner of the EEOC.

"In the light of this and the other relevant statements contained in the Guillory affidavit, it seems clear (3) to the Court that the basis for its prior decision and order is effectively undermined.

"Taking this conclusion in conjunction with the fact that there was no apparent reason for the EEOC to foresee the basis on which the Court would rule prior to the time at which the opinion was actually delivered, I must conclude that the relief sought by the EEOC to the extent that it seeks a vacating of the prior order dated April 28, 1975, would be granted by me were such an opportunity afforded by the Fourth Circuit Court of Appeals."

Following the dispatch of that letter, and on August 5, 1975, the Commission filed a motion to remand with the Fourth Circuit. A copy of the Court's July 28 letter was attached to that motion. By letter dated April 11, 1975, counsel for respondent advised the Clerk for the United States Court of Appeals for the Fourth Circuit that respondent would not oppose remand. On August 27, 1975, the Fourth Circuit entered an order remanding the case to this Court. Thus, the issue of relief from this Court's previous order denying subpoena enforcement is currently before the Court, as is the issue of the subpoena enforcement itself.

Respondent's first objection to the subpoena enforcement is that the Commissioner's charge is invalid because it was not deferred to the Maryland Commission on Human Relations or the Baltimore Community Relations (4) Commission. Therefore, the Crawley charge, which is predicated upon the validity of the Commissioner's charge, it is said, cannot be enforced.

Section 2000e-5(d) of volume 42 of the U.S. Code provides:

> "In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days, unless a shorter period is requested, to act under such State or local law to remedy the (5) practice alleged."

Respondent contends that the Commission is required by the statute to give notice to the State agency and, since it did not do so, it is not entitled to exercise its investigatory powers afforded under Title VII of the Civil Rights Act of 1964. It argues that a governmental

agency must comply with its own regulations, particularly those intended primarily to confer important procedural rights. The Court holds, however, that to deny subpoena enforcement on the basis of a claimed violation of the notice requirement in the instant case would be to exalt form over substance.

The Supreme Court made clear in *Love v. Pullman*, 404 U.S. 522, a 1972 decision, that no purpose is served by the attachment of additional procedural technicalities to the processing of charges alleging employment discrimination.

In addition, Judge Miller of this Court in the recent decision of *EEOC v. Local 2P*, Civil Action Number M74-579 (1975), stated that "common sense interpretation must be applied to those murky situations in which the dividing line is not glaringly bright."

There, Judge Miller denied defendant's summary judgment motion which had alleged that the EEOC had failed to comply with the regulation requiring notification of the defendant, prior to the institution of suit, that it had one (6) last chance to avoid litigation by a bona fide attempt at conciliation of the dispute.

The facts in that case established that the EEOC had been in contact with the defendant and had in fact engaged in several attempts to reach a successful conciliation of the dispute, and that defendant had been specifically advised litigation was to be expected if settlement could not be reached. Settlement was not reached and the EEOC filed a complaint without first sending defendant a last chance letter. Defendant attempted to defeat the complaint by a summary judgment motion based on this procedural defect, but Judge Miller denied the motion, stating:

> "While a hypertechnical interpretation of the requirements fully discussed in *Firestone* might lead one to conclude that the requisite last chance letter was not sent to the defendant, this Court believes such interpretation would exalt form over substance."

Here, too, the Court will avoid a hypertechnical interpretation of the statutory requirements and will first examine the relationship between the EEOC and the Maryland Commission as set forth in the affidavit of Elbert Guillory, Executive Director, Maryland Commission on Human Relations. (7) In paragraph four, Mr. Guillory states:

> "It has been and continues to be a long-standing policy and practice of the MCHR to decline all EEOC offers of referral which involve a charge filed by a Commissioner of the EEOC. A primary reason for this MCHR policy and practice is the determination that MCHR's resources will be focused on charges received by MCHR, particularly those filed by MCHR Commissioners. I have reviewed the MCHR records and have found that MCHR has never accepted an EEOC offer of referral on an EEOC Commissioner's Charge. I am, and have been, aware that MCHR has the prerogative to accept an EEOC offer of referral of an EEOC Commissioner's Charge. The staff of MCHR is similarly aware of MCHR's right in this regard."

He further states in paragraph five:

> "I have been advised of the Court's decision in this proceeding wherein the Court expressed disapproval of (8) the EEOC's referral actions with respect to the *Powell v. USF&G* charge. The actions taken by EEOC coincidental to referring the *Powell* charge to MCHR were entirely consistent with the understanding and practice which has been established between EEOC and MCHR, i.e., to proceed with the investigation of an EEOC Commissioner's Charge, because MCHR will not accept an offer or referral on an EEOC Commissioner's Charge."

It is clear from Mr. Guillory's affidavit that, although the MCHR was aware of its right to accept an EEOC charge, it had never done so and that there was an understanding between the EEOC and the MCHR that MCHR would not accept an EEOC charge. In those

circumstances, requiring EEOC to tender a referral offer to the MCHR, within the technical requirements of the statute and regulations, would serve no practical purpose, nor is it required by the statute. The Maryland Commission, as a matter of policy, has concluded that it will not assume jurisdiction over charges filed by an EEOC Commissioner and has made the EEOC aware of its policy in this regard. Title VII does not require the EEOC to perform a futile, hollow act. To so (9) interpret the statute would do no more than to add a hypertechnical procedural interpretation, the result of which would be to require the agencies to delay action while form letters were exchanged.

Further, the statute requires the Commission to give the state agencies time to act, upon request. It appears to be the intent of Congress that the State and local agencies be given an opportunity to act to remedy an alleged practice, if that agency wants to act. Here, the Maryland Commission has made it clear that it does not want to act and had, in effect, requested that EEOC give it no time to act.

In sum, the Court holds that the question of proper notice and deferral should be resolved in favor of the petitioner and that the statutory requirements were sufficiently met. Therefore, the Commissioner's Charge is not rendered invalid for lack of proper notice and deferral.

Respondent's second argument is that the Commission's procedures authorizing the Section 707 team leader to recommend initiation of Section 707 charges, conciliate the charge, and file suit commingles functions which basic fairness and due process require be separated. Section 6(a) of Commission Notice N-916 provides that the Section 707 team should propose respondents for Section 707 action, should outline the reasons for selecting respondent, and should provide some indication of the scope of a possible (10) suit. Thus, respondent argues, the Section 707 team is the acknowledged adversary of the respondent even before the investigation is begun. By allowing the 707 team to pursue the investigation, it contends, the Commission

has deprived respondent of an impartial investigator, since the investigator is also the initiator of the charge.

Moreover, Commission Notice N-916 contemplates that the 707 team should, upon completion of the investigation, draft the Commission's decision, be responsible for conciliation, decide whether conciliation has failed, and recommend and initiate legal proceedings. Respondent argues that the prosecutor ought not be the conciliator, and the conciliator should not be the investigator, and the investigator should not be the initiator of the charge.

The Court holds that combining the initiator and the investigator of a Section 707 charge does not violate due process. In the first place, the EEOC is not an adjudicatory agency and the investigator is not an adjudicator. EEOC is the agency created by Congress to have primary responsibility for the implementation of Title VII's provisions for investigation of charges of unlawful employment practices and for attempting to eliminate such practices by informal methods of conference, conciliation, and persuasion. Congress gave the federal courts, not the Commission, the responsibility and authority to determine whether an unlawful (11) employment practice has occurred. The EEOC has no power to issue orders or to take other action which has a determinate legal effect on either charging parties or respondents. The only means by which the Commission can obtain legal effect for any of its decisions is through the federal court system. This being so, the consolidation of the initiating and investigating functions does not deprive a respondent of due process in the determination of his rights, since it is the courts that make that determination and not the EEOC.

In addition, the procedures for the administrative processing of charges make clear that the various functions are not combined in a manner which is at variance with constitutional due process. The Commission has, pursuant to Section 705(b)(1), 42 USC 2000e-4(b), delegated authority and responsibility to the general counsel, through his staff, to conduct the

administrative processing of 707 Commissioner's charges and to recommend a decision to the Commission for approval. However, it is the Commission, upon review of the general counsel's recommendation, which approves or disapproves the decision. Likewise, if a decision of reasonable cause is made by the Commission, and the case is returned to the general counsel for conciliation and conciliation fails, again, the general counsel reports the failure to the Commission and transmits his recommendation concerning litigation to the Commission. It is the Commission (12) that decides whether or not litigation will be authorized. Thus, the various functions are divided between the general counsel and the Commission, with the Commission having final approval over decisions made by the general counsel.

In sum, it is apparent that the Section 707 procedures do not violate due process. Respondent receives a fair trial in the federal court, if the case goes that far. The fact that the same office initiates and investigates a charge does not prejudice the respondent in any way, since that office makes no determination as to rights and simply presents its findings to the Commission for approval. Thus, the Court holds that respondent's contention is without merit.

Respondent further argues that the Crawley charge cannot be consolidated with the Commissioner's Charge because the Crawley charge was filed after the Commissioner's Charge issued.

In addition, respondent contends, the Commissioner's charge makes no allegation that the respondent engaged in any pattern or systematic practice of discharging persons because of their race and individual charges of discriminatory termination are irrelevant in pattern and practice cases except in those instances where the discharge is alleged to have been carried out in accordance with a company-wide practice.

The Commission's Procedural Regulations dealing with (13) the processing of 707 cases provide for the consolidation of like and related charges. See EEOC

Procedural Regulations 1601.50 *et. seq.*, particularly Section 1601.52. These regulations were developed and promulgated after the Commission was given exclusive jurisdiction and authority on March 24, 1974, over all allegations of patterns and practices of discrimination under Section 707.

Section 1601.52 provides:

> "Any member of the Commission may designate a charge for 707 processing under this subpart. Any related charge shall be processed under this subpart if the general counsel determines that it should be consolidated with the charge designated for 707 processing by a member of the Commission."

The regulation provides that any related charge may be consolidated. There is no limitation as to timing of the various charges that may be consolidated or restricting the consolidation of individual charges with pattern and practice charges. Nor would it serve any purpose to impose such restrictions. One of the Commission's principal concerns in the development of its 707 case processing (14) regulations was to assure that individual charges raising like or related issues be consolidated for processing with any 707 Commissioner's Charge against the same respondent in order to assure maximum use of the agency's resources and maximum benefit to the victims of unlawful discrimination. Although the Commission consolidates the charges for processing, each charge is handled individually, and individual findings and determinations are made. It would be unfair to do otherwise, for the relative merits of individual charges differ, and the relief to be sought depends often on the circumstances peculiar to the individual charging party. Such consolidation of charges for administrative processing is done routinely, not only under the 707 procedures, but in the Commission's regular processing of Section 706 charges.

The Court agrees with the EEOC that consolidation of individual private charges with a Commissioner's charge against the respondent for administrative

processing is appropriate and proper because it is an efficient and effective way of dealing with allegations of unlawful employment discrimination directed at a given respondent. Through consolidation, the agency can deal with such important matters as eliminating the potential problem of the res judicata effect of the resolution of one or more charges on the legal rights of charging parties or persons (15) covered by other similar charges against the same respondent, reducing or eliminating the enormous backlog of charges which have accumulated and continue to accumulate, and resolving the problems of overlapping charges in one consolidated proceeding instead of through overlapping investigations.

Given the important purposes served by consolidation, the Court holds that the above objections to consolidation are without merit.

Similarly, respondent's objection as to the number of charges consolidated is not sufficient to invalidate the consolidation in this case. On the whole, respondent's arguments against consolidation, as in the case as a whole, ask the Court to adhere so strictly to the statute and regulations that the intent of Congress in eliminating employment discrimination would be frustrated. This, the Court is unwilling to do.

Therefore, the Court will sign an order granting the petitioner's motion for relief from the Court's prior order under Rule 60 and, further, granting petitioner's motion for subpoena enforcement.

* * * * * *

I hereby certify that the foregoing is a true and accurate transcript of the oral opinion of the Court in the aforementioned matter.

ALFRED A. BETZ
Official Court Reporter

CHARGE OF DISCRIMINATION — TBA5-0586-WEQ

INSTRUCTIONS
If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discrimination occurs at such place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE WITH EEOC SOON AS POSSIBLE. (Attach extra sheets of paper if necessary.)

CAUSE OF DISCRIMINATION
☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN

DATE OF BIRTH

DISTRICT OFFICE

Mr. Edgar C. Crawley, Sr.

STREET ADDRESS: 6749 Park Heights Avenue — COUNTY

SOCIAL SECURITY NO.

CITY, STATE, AND ZIP CODE: Baltimore, Maryland 21215

TELEPHONE NO. (Include area code): 664-4395

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME (Indicate Mr. or Mrs.) — TELEPHONE NO. (Include area code)

STREET ADDRESS — CITY, STATE, AND ZIP CODE

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (If more than one, list all)

NAME: U.S.Fidelity & Guaranty Company — TELEPHONE NO. (Include area code)

STREET ADDRESS: Charles & Lombard Street — CITY, STATE, AND ZIP CODE: Baltimore, Maryland 21202

OTHERS WHO DISCRIMINATED AGAINST YOU (If any)

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY? ☑ YES ☐ NO — DATE FILED: 9/23/74 — AGENCY CHARGE FILED WITH (Name and address): HCHR

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year): 9-16-74

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

I was terminated by the above company after eleven years service without warning. The reason given to me was unsatisfactory work performance. Since I feel that my work performance was satisfactory I feel the real reason for my termination was because of my race.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE: 9/23/74 — SIGNATURE OF COMPLAINANT: Edgar C. Crawley Sr.

Subscribed and sworn to before me this date

DATE — SIGNATURE AND TITLE

NOTARY PUBLIC

Subscribed and sworn to before me this (Month, day, and year): 23rd Sept., 1974

NOTARY PUBLIC

My Commission Expires July 1, 1975

NR

EEOC Form 5 — Previous editions of this form may be used.

GUILLORY DEPOSITION

* * * * * *

(D. 6) Now, as Mr. Tierney[1] will explain, it was my understanding that the information requested in the notice of deposition and in the subpoena that was served upon you is, at least as it now stands, currently unavailable.

Mr. Tierney, would you like to make a statement with respect to that?

(Mr. Tierney) Thank you. As I understand the subject, there are two classifications of documents requested. One deals with the Commission's policy on EEOC Commissioner complaints. Regarding that classification, the Commission does not have any general documentation. The policy is a custom and practice that has been instituted by the Executive Director and carried out without formal promulgation of any written policies. * * *

* * * * * * *

(D. 87) He works for a totally separate agency.

(Whereupon a document was marked as Respondent's Exhibit 6.)

By Mr. Brewer:

Q. You have in front of you a document which purports to be a letter written by you to Mr. Dickerson, dated October 7, 1974. I ask you if you can identify that document? A. Yes.

Q. That is, in fact, the letter you wrote to Mr. Dickerson? A. Yes.

Q. It is in response to his letter of October 7, 1974? A. Yes, it is.

Q. It says, quoting: "Thank you for your letter of October 7, 1974, notifying the Maryland Commission on Human Relations of the above-referred Commissioner's Charge and offering the Maryland Commission an opportunity to act on this charge. The Maryland Commission will not (D. 88) accept this offer."

[1] Mr. Tierney is the Maryland Commission's General Counsel, and represented Mr. Guillory at this Deposition.

That is your letter? A. Yes.

Q. Is this in accordance with the long-standing policy that you have? A. It is not violative of a long-standing policy, it is superfluous of a long-standing policy, which permits us to verbally, one agency to verbally communicate to the other, that such a Commissioner's charge exists, as a matter of courtesy.

The other agency, as a matter of courtesy and in accordance with the policy, always stands aside for matters of resource allocation, geography, interest of the originating agency, and common sense.

Now, apparently, there was some concern. I have no idea what it was. I don't know what goes on at EEOC. I have no responsibility for supervising what happens at EEOC. I don't work there.

* * * * * *

(D. 96) A. It is still within our prerogative, within our right, according to Title 7, to accept that charge.

Q. If you accepted a charge, that would be in contravention of this policy; would it not? A. Absolutely, yes, and you are absolutely correct and that does not negate the prerogative we have to accept one if we desire to accept one, in violation of the longstanding policy.

Q. Who would make the decision to accept in that case? A. The Executive Director would.

Q. You would? A. Yes, or the person occupying that position at any given time.

Q. The Executive Director, and correct me again, if I am wrong, he would not be answerable to anyone for that decision? He would not have to check that with the Commissioners, get the Commissioners of your Commission to get their approval to do this? A. You are correct if you are saying the Commissioners would not have to approve his administrative policy, yes.

DECISION OF THE CIRCUIT COURT OF APPEALS

PER CURIAM:

United States Fidelity and Guaranty Company appeals the decision of the District Court enforcing a subpoena *duces tecum* against it in connection with charges that its employment practices discriminated upon the basis of race, sex, etc. in violation of sections 706 and 707 of the Civil Rights Act of 1964, 42 USC §§ 2000e-5, 6.

Appellant contends that the Commission's charge is defective because it did not afford the Maryland Commission on Human Relations or the Baltimore Community Relations Commission a meaningful opportunity to determine whether to make a request for deferral as required by section 2000e-5(d) of the Act. It is further alleged that the complaint initiated by the Commission was not "related" to that brought by the private party and thus the two were improperly consolidated pursuant to the Commission's regulation at 29 CFR § 1601.52. Also, the Commission's regulations pursuant to which these charges were processed (29 CFR §§ 1601.50 — 1601.59) were assertedly violative of Appellant's right to due process.

We have considered the contentions made in brief and at bar and believe for the reasons stated by the District Judge in his oral opinion dated October 31, 1975 that they should not prevail in this case. In addition, we would note with respect to the attack on the Commission's procedures in accordance with section 2000e-5(d), that once notification and opportunity for deferral were provided to either the Maryland Commission on Human Relations *or* the Baltimore Community Relations Commission, the obligations imposed by the Act were satisfied.

Affirmed.

STATUTORY APPENDIX

1. *Relevant Statutes:*

Title VII of the Civil Rights Act of 1964, *as amended* 42 U.S.C. § 2000e *et seq.* (1972):

Section 705(b) (1), 42 U.S.C. § 2000e-4(b) (1) provides:

There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is apponted and qualified.

Section 706(d), 42 U.S.C. § 2000e-5(d) provides:

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under

such State or local law to remedy the practice alleged.

Section 707(e), 42 U.S.C. §2006e-6 (e) provides:

Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

2. *Relevant Regulations of the Equal Employment Opportunity Commission:*

Section 1601.10, 29 CFR § 1601.10 (1975) provides:

Any member of the Commission may file a charge in writing with the Commission. If section 706(d) of title VII should be applicable, the Commission, before taking any action with respect to the charge, shall notify the appropriate State or local 706 Agency, as defined in § 1601.12(c), and offer to refer the charge to it, except for certain section 704(a) charges as provided in § 1601.12(f). The Commission will allow the State or local authority a 10-day period to request an opportunity to act under its law except when EEOC notifies the appropriate authority in writing of a different time period.

Section 1601.12, 29 CFR § 1601.12 (1975) provides in pertinent part:

(a) In order to give full weight to the policy of section 706 (c) of the Act, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII and State or local law, the Commission adopts the following procedures with

respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to an appropriate 706 Agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies.* * *

* * * * * *

Section 1601.51, 29 CFR § 1601.51 (promulgated April 10, 1975) provides:

The General Counsel is hereby delegated authority to give notice of and to defer charges to State and local 706 agencies as defined in § 1601.12(c), to give notice of charges to respondents, to investigate charges, to sign and issue subpoenas, and to conciliate charges of employment discrimination.

Section 1601.52, 29 CFR § 1601.52 (promulgated April 10, 1975) provides:

Any member of the Commission may designate a charge for section 707 processing under this subpart. Any related charge shall be processed under this subpart if the General Counsel determines that it should be consolidated with the charge designated for section 707 processing by a member of the Commission.

Section 1601.54, 29 CFR § 1601.54 (1975) provides in pertinent part:

(a) Where the alleged unlawful employment practice occurs in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice (or to institute criminal proceedings), the General Counsel shall notify, on behalf of the Commission, the appropriate State or local 706 Agency, as defined in § 1601.12(c), before taking any action with respect to a Commissioner's Charge.

* * * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES PLYWOOD AND CHEMICAL COMPANY,
PETITIONER,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
RAY M. GAITTA,
Attorneys,
Equal Employment Opportunity
Commission,
Washington, D.C. 20506.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-442

UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 46) and the oral decision of the district court (Pet. App. 33-42) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1976. The petition for a writ of certiorari was filed on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether when the EEOC consolidates a private charge and a Commission charge for purposes of investigation, enforcement of a private charge administrative

subpoena can be challenged on the basis of an alleged defect in the public charge deferral procedures.

2. Assuming that upon consolidation such a defect in the public charge would taint the private charge, whether the court below properly enforced an EEOC subpoena where the Commission initially failed to offer to defer to a local agency which had a policy and practice never to accept EEOC Commissioner's charges, and subsequently made a formal offer of deferral.

3. Whether enforcement should have been denied because the Commission's procedures authorize the same individual to recommend initiation of charges, to conciliate the charges and to file suit for violation of Section 707 of the Civil Rights Act.

STATEMENT

This case arises out of the consolidation of a private charge under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, with a preexisting Commissioner's charge under the same statute, for purposes of investigation only, pursuant to EEOC Notice N-916, §6(c) (Pet. App. 10). Petitioner seeks to challenge a subpoena issued pursuant to the private charge, on the basis of an alleged procedural defect in the Commission charge. Petitioner also argues that the combination of investigatory, conciliatory and charge-initiation functions in the same person violates Title VII.

On August 16, 1974, then Commission Chairman Powell issued a charge of pattern or practice of discrimination against petitioner under Sections 706 and 707 of Title VII, 42 U.S.C. 2000e-5 and 2000e-6 (Pet. App. 2). The EEOC notified the Maryland Commission on Human Relations of the Commissioner's charge on September 4, 1974, but did not state that the Maryland Commission

had 10 days within which to request a deferral as required by EEOC Notice N-916, §7 (Pet. App. 20). The EEOC commenced its investigation and several interviews were conducted during the month of September. However, a review of the Commissioner's charge file in October indicated that service of the charge had in fact been premature. In order to cure any possible defect in the September 4 offer, EEOC sent a second letter to the Maryland Commission on October 7, 1974, asking it to respond within 10 days if deferral was desired, even though the Maryland Commission had already informed the EEOC, on October 3, 1974, that it planned no action on the matter (Pet. App. 4-5).[1] The Maryland Commission formally declined the second offer of deferral on October 7, 1974 (Pet. App. 5-6).

On September 23, 1974, Edgar Crawley, a former employee of the petitioner, filed a private charge with the Maryland Commission on Human Relations. After the expiration of the 60-day statutory period of deferral specified by Section 706(c), the EEOC assumed jurisdiction. The EEOC gave the company notice of the charge on December 2, 1974 (Pet. App. 33). Petitioner raises no challenge to the procedures accompanying the processing of the private charge.

In December, under an internal directive, EEOC Notice N-916, §6(c) (Pet. App. 10), the Crawley charge was designated for processing together with the Commissioner's charge by the office of General Counsel. At various times several other related private charges were also designated for consolidation. Such consolidation is for processing only, each charge is handled individually, and individual determinations and findings are made (Pet. App. 41).

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[1]The Commission's letter of October 7 was hand delivered.

On December 6, 1974, the Commission served an administrative subpoena in the private charge case. Petitioner refused to comply and on March 26, 1975, the Commission filed this suit in the district court to enforce its subpoena (Pet. App. 33). Petitioner argued that the failure to send the appropriate offer of deferral on September 4 invalidated the investigation of the Commission charge notwithstanding the subsequent offer of deferral made on October 7. Claiming that this defect tainted the private charge subpoena as well, petitioner asked the district court to refuse to enforce the private charge subpoena because the "EEOC has violated its statutory mandate * * * with respect to the Commissioner's charge of August 21, 1974 * * * " (Pet. App. 14).

The district court, apparently assuming that any defect in the processing of the Commissioner's charge would also invalidate a subpoena under the private charge, first declined to enforce the subpoena on the ground that the statutorily required offer of deferral had not been made (Pet. App. 18-25). However, the court vacated that judgment upon receipt of an affidavit from the Executive Director of the Maryland Commission on Human Relations attesting to its long standing practice of never accepting an "offer of referral on an EEOC Commissioner's Charge" (Pet. App. 32). In the face of this established understanding, the court viewed petitioner's challenge as "hypertechnical" (Pet. App. 38). The court then directed enforcement of the subpoena, also overruling petitioner's contention that it was improper to assign investigative functions to an attorney in the General Counsel's office since "the EEOC is not an adjudicatory agency" (Pet. App. 33-42).

A stay pending appeal was denied by both the district court and the court of appeals. The court of appeals affirmed *per curiam* "for the reasons stated by the District Judge * * * * " (Pet. App. 46). The information

sought by the subpoena has been turned over to the EEOC which deems the company to have complied fully with the subpoena.[2]

ARGUMENT

1. Petitioner sought to prevent enforcement of an EEOC subpoena issued in a private charge case but did not, and does not now, deny the relevance of the private charge subpoena or allege any procedural defect in the notice procedures accompanying issuance of the private charge. Instead petitioner seizes upon an alleged procedural defect in the issuance of a Commission charge which was consolidated with the private charge only for processing and investigation purposes. No authority is cited, and we have found none, to support the proposition that consolidation of EEOC charges for processing makes each charge vulnerable to the procedural defects of every other consolidated charge. Such a rule would deter the efficient processing of related charges through consolidation — a procedure designed "to assure maximum use of the agency's resources and maximum benefit to the victims of unlawful discrimination" (Pet. App. 41).

There can be no doubt about the separate nature of the proceeding which generated the challenged subpoena. The subpoena was issued under the name of the private charge and, under standard Commission practice, the private charge proceeding at all times retained its

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[2]The case is not moot, however, since other private charges against petitioner are under investigation by the Commission and the same issues may be raised by the petitioner. *See, e.g., National Labor Relations Board* v. *Raytheon Co.*, 398 U.S. 25.

separate identity (Pet. App. 41). There can, accordingly, be no basis for a challenge to the private charge subpoena in any alleged failure to properly defer in the Commission charge case.[3]

2. In any event, the alleged defect in the deferral of the Commissioner's charge would not justify denial of enforcement of the subpoena. Unlike Section 706(c) which requires mandatory deferral of a private charge to a local agency, Section 706(d) merely provides the local agencies with the option to request referral. The EEOC is required to give notice of a Commissioner's charge, and *"upon request,"* to afford the agency a reasonable time to assert jurisdiction over the claim. The purpose of the offer of referral requirement is to provide the local agency with a meaningful opportunity to decide whether it will exercise its option to act under state or local laws to remedy the alleged practice. *See Crosslin* v. *Mountain States Telephone and Telegraph Co.* 422 F. 2d 1028 (C.A. 9), remanded with instructions, 400 U.S. 1004. However, as the affidavit from the Executive Director of the Maryland Commission on Human Relations demonstrates, there is a settled policy of that Commission never to accept EEOC referrals of such charges. Mr. Guillory stated (Pet. App. 32):

> It has been and continues to be a longstanding policy and practice of the MCHR to decline all EEOC offers of referral which involve a charge filed by a Commissioner of the EEOC. A primary reason for this MCHR policy and practice is the determination that MCHR's resources will be focused on charges received by MCHR, particularly those filed by MCHR Commissioners. I have reviewed the MCHR records and have found that MCHR has never accepted an EEOC offer of referral on an EEOC Commissioner's Charge. I am, and have been, aware that MCHR has the prerogative to accept an EEOC offer of referral of an EEOC Commissioner's Charge. The staff of MCHR is similarly aware of MCHR's right in this regard.

In the presence of a settled local agency policy to refuse all such referrals, notice of a Commission charge without an explicit offer of deferral does not violate the statute. As the district court said: "[R]equiring EEOC to tender a referral offer to the MCHR, within the technical requirements of the statute and regulations, would serve no practical purpose, nor is it required by the statute. * * * Title VII does not require the EEOC to perform a futile, hollow act" (Pet. App. 38).[4]

Even if it is assumed that the September 4 notice was deficient, that deficiency was cured by the second notice of October 7 which complied with all technical aspects of Section 706(d).[5] The fact that the Commission

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[3]The EEOC maintained throughout the proceedings below that the private charge subpoena could not be challenged on the basis of a defect in a public charge, especially one which occurred months before the consolidation for processing had even taken place (Pet. App. 27, n. 2).

[4]Petitioner complains that the policy of refusing referrals is not published and claims a violation of the Administrative Procedure Act (Pet. 20). However, the policy of refusal is a state policy, not an EEOC policy, and its non-public nature therefore is not a basis for challenging EEOC enforcement procedures.

[5]There is no merit in petitioner's suggestion (Pet. 5) that the charge was also required to be referred to the Baltimore Commission. EEOC Procedural Regulation 1601.12(g) (29 C.F.R.) provides:

> Where both State and local 706 Agencies exist, the Commission reserves the right to defer to the State 706 Agency only. However, if the Commission determines that it would best serve the purposes of the Act, it may defer to either or both State and local 706 Agencies.

had conducted three investigatory interviews between the two notices should not forever deprive the Commission of the authority to investigate a serious charge which had not progressed beyond the tentative initial stages of investigation. No purpose of the Commission, the State of Maryland, or even of the petitioner, would be served by dismissing the Commissioner's charge and requiring a new one. Petitioner argues that acceptance of the referral by the states would help alleviate EEOC backlogs. However, issuance of a new charge will not affect the policy of the Maryland Commission to refuse all Commission charge referrals. Petitioner admits "Section 706(d) obviously does not require the State agency to accept the offer of referral * * * " (Pet. 20-21).

The decision below is not in conflict with cases cited by petitioner (Pet. 13-14, 19) which hold that, where the Commission has failed to defer to a state agency, the district court may retain jurisdiction for a period sufficient to accomplish the deferral. The cases uniformly indicate that non-deferral may be cured even if the Commission has acted in the interim.[6] The other decision relied on, *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (C.A. 8), affirming the dismissal without prejudice of a Commission suit for its failure to send a notice required by its regulation, was based on a conclusion that the absence of notice prejudiced the company. Here, no prejudice was shown, and any possible defect was cured by the second notice.

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[6] *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 422 F. 2d 1028 (C.A. 9), vacated and remanded with instructions, 400 U.S. 1004; *Motorola, Inc.* v. *Equal Employment Opportunity Commission*, 460 F. 2d 1245 (C.A. 9); *Equal Employment Opportunity Commission* v. *Wah Chang Albany Corp.*, 499 F. 2d 187 (C.A. 9); *Mitchell* v. *Mid-Continent Spring Company of Kentucky*, 466 F. 2d 24 (C.A. 6).

3. The procedure outlined in EEOC Notice N-916, §7 (Pet. App. 11-12), for the processing of Section 707 "pattern or practice" charges by an individual in the office of General Counsel, neither contravenes the statute nor denies petitioners due process (Pet. App. 38-40). Since the Commission is not an adjudicatory body,[7] there is no commingling of prosecutorial and adjudicatory functions. The ultimate decisions as to reasonable cause and, if necessary, as to instituting suit are made by the Commission. Whether a charge is investigated by a Commission investigator or a Commission attorney is merely a matter of internal management as to the use of Commission personnel.

The legislative history is not to the contrary. The portion relied on by petitioner (Pet. 25) occurred during discussion of an amendment to a bill (S. 2515, 92d Cong., 1st Sess. (1971)) which would have given the EEOC quasi-judicial powers to hear complaints and issue cease and desist orders. A number of congressmen felt that these quasi-judicial powers required a separation of the Commission's prosecutorial and decisional functions by removing the General Counsel from the investigation and conciliation process until a judicial complaint had been issued. Senator Williams' remark quoted by petitioner (Pet. 25) was made in support of the amendment (No. 797) separating the two functions.[8] Since the 1972 amend-

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[7] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 799. *See also, Hannah* v. *Larche*, 363 U.S. 420, 442; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-599.

[8] As enacted in 1972, Section 705(b) does not contain the following language which was proposed by Amendment No. 797 to S. 2515, in order to ensure the separation of functions:

> The General Counsel shall have responsibility for the issuance of complaints, the prosecution of such complaints before the Commission * * * . In accordance with the provisions of Section

ments to Title VII, as enacted, did not confer the proposed quasi-judicial functions on the Commission, the quoted remarks have no relevance to the present statute.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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554(d) of title 5, United States Code, no employee or agent of the Commission may engage in the performance of prosecutorial functions for the Commission in a case or any factually related case, and also participate or advise in the decision, except as a witness in public proceedings * * *.